

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

)
Public Hearings to Determine)
Whether to Adopt Cease and Desist)
Orders against:)
)
Mark and Valla Dunkel, Middle River)
in San Joaquin County;)
)
Yong Pak and Sun Young (Pak/Young),)
Duck Slough in San Joaquin County;)
)
Rudy Mussi, Toni Mussi and Lory C.)
Mussi Investment LP (Mussi et al.),)
Middle River in San Joaquin County)
~~~~~ )

JOE SERNA JR./CALEPA BUILDING

1001 I STREET

COASTAL HEARING ROOM

SACRAMENTO, CALIFORNIA

VOLUME V

WEDNESDAY, AUGUST 4, 2010

12:08 P.M.

LINDA KAY RIGEL, CSR  
CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 13196

A P P E A R A N C E S

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Charles R. Hoppin, Chair

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Ernest Mona, Water Resource Control Engineer

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1 P R O C E E D I N G S

2 --o0o--

3 CO-HEARING OFFICER BAGGETT: Okay. Good  
4 afternoon. We are here to continue the Mark and Valla  
5 Dunkel Cease and Desist Order Hearing.

6 I'm Art Baggett, Board Member. And acting as  
7 my Co-Hearing Officer is Chair of the Board, Charlie  
8 Hoppin. You all know the staff by now. Dana Heinrich's  
9 our Staff Counsel, and Ernie Mona is our engineer  
10 assigned to work on this.

11 The State Water Board conducted the Dunkel CDO  
12 Hearing on May 5th, 2010. The hearing is continued  
13 today for the limited purpose of reopening the  
14 administrative record in order for the State Water Board  
15 to receive additional evidence relevant to the Dunkels'  
16 claim of a riparian water right for their property.

17 The hearing will continue to be conducted in  
18 accordance with the Notice of Public Hearing dated  
19 February 18, 2010 and July 23rd, 2010.

20 Everybody here knows the evacuation procedures.  
21 Follow the green exit signs outside across the park to  
22 the farmers market.

23 This hearing is webcast and will both be  
24 recorded in audio and video. In addition, the court  
25 reporter is here -- I think you all know the rules --

1 preparing the transcript, and make your own  
2 arrangements.

3 Are there any other procedural issues before we  
4 begin that any of the parties have?

5 MS. GILLICK: Just for the record, Dean Ruiz is  
6 not here today on behalf of the Delta Agencies, and I  
7 will be representing the Delta Agencies for that purpose  
8 today.

9 CO-HEARING OFFICER BAGGETT: Very good.

10 MS. GILLICK: And it's DeeAnne Gillick.

11 CO-HEARING OFFICER BAGGETT: Thank you.

12 I guess make appearances, restate your name and  
13 address. We've got one already. So the other parties,  
14 want to restate your name and address for the record.

15 Prosecution?

16 MR. ROSE: David Rose for the Division of Water  
17 Rights Prosecution Team. Address 1001 I Street,  
18 Sacramento, California 95814.

19 MR. HERRICK: John Herrick for the Dunkels,  
20 4255 Pacific Avenue, Suite 2, Stockton, 95207.

21 CO-HEARING OFFICER BAGGETT: Modesto?

22 MR. O'LAUGHLIN: Tim O'Laughlin Modesto  
23 Irrigation District, 110 Meyer Street, Suite 117, Chico,  
24 California 95928.

25 MR. RUBIN: Jon Rubin for the San Luis &

1 Delta-Mendota Water Authority with the law firm of  
2 Diepenbrock, Harrison, 400 Capitol Mall, Suite 1800,  
3 Sacramento, California 95814.

4 MR. POWELL: Stan Powell representing the State  
5 Water Contractors, 400 Capitol Mall, 27th Floor,  
6 Sacramento, California 95814.

7 CO-HEARING OFFICER BAGGETT: And who else --  
8 DeeAnne, you might as well go again.

9 MS. GILLICK: DeeAnne Gillick on behalf of San  
10 Joaquin County as well as San Joaquin County Flood  
11 Control and Water Conservation District, and today as  
12 well for Central Delta Water Agency and South Delta  
13 Water Agency, 509 West Weber Avenue, Stockton,  
14 California 95201. Thank you.

15 CO-HEARING OFFICER BAGGETT: Will those persons  
16 who are testifying today please stand and raise your  
17 hand. Do you promise to tell the truth in these  
18 proceedings?

19 PROSPECTIVE WITNESSES (collectively): I do.

20 CO-HEARING OFFICER BAGGETT: We received  
21 written testimony and exhibits from the Dunkels and  
22 joint testimony exhibits from Modesto Irrigation  
23 District, the State Water Contractors, San Luis &  
24 Delta-Mendota Water Authority.

25 So let's just jump straight into the direct

1 testimony. Mr. Herrick?

2 (Discussion off the record)

3 CO-HEARING OFFICER BAGGETT: Let's go back on  
4 the record.

5 --o0o--

6 LANDON BLAKE

7 DANTE JOHN NOMEILLINI

8 Called by MARK and VALLA DUNKEL

9 DIRECT EXAMINATION BY MR. HERRICK

10 --o0o--

11 MR. HERRICK: John Herrick for the Dunkels.

12 Today, we'll put on the two witnesses which include  
13 Landon Blake and Dante Nomellini, have them as a panel.

14 I will ask -- they've already taken the oath  
15 just now. I'll ask them to summarize their testimony,  
16 and we'll proceed from there.

17 Mr. Blake please.

18 MR. BLAKE: I was asked to examine relevant  
19 documents in the Dunkel parcel's chain of title to  
20 determine if it had maintained a surface connection to  
21 the waterway.

22 And although I'm not an attorney and I didn't  
23 make any legal conclusions, I was told that conclusions  
24 about riparian rights can be drawn from that evidence,  
25 so that's what I'm going to discuss today.

1 I'd like to at the beginning just summarize my  
2 conclusions for the Board, and then I'll hit this again  
3 at the end.

4 I conclude that the Dunkel parcel was directly  
5 connected to Middle River until the time after the time  
6 of an agreement to furnish water between Woods  
7 Irrigation Company and Jessie Wilhoit and Mary Douglass,  
8 and that was on September 29, 1911.

9 That agreement is Dunkel Exhibit 2B which has  
10 been submitted already.

11 I also believe that the 1911 agreement and a  
12 natural interior slough and an existing irrigation  
13 system in place by 1911 provides evidence of intent for  
14 the Dunkel parcel to maintain a connection after it was  
15 separated. And we'll get into those details a little  
16 bit later.

17 So what I'd like to do now is just explain for  
18 the Board how I reached the conclusion that the Dunkel  
19 parcel maintained that direct connection to Middle River  
20 up to the 1911 agreement and then go in and present the  
21 evidence that I believe demonstrates that the Dunkel  
22 parcel had an intent to preserve a direct connection to  
23 Middle River after it was separated through the  
24 transactions and the chain of title.

25 So we'll start with the chain of title analysis

1 that I performed. And just to clarify, the documents  
2 that we examined as part of this chain of title came  
3 from three sources.

4 That was work done by Mr. Thurl Pankey,  
5 testimony presented by Stephen Wee in this hearing or  
6 other hearings before the Board, and finally by chain of  
7 title research performed by me or under my direct  
8 supervision at the San Joaquin County Clerk and  
9 Recorder's.

10 We're going to begin this examination of the  
11 transfers in the chain of title with the patent, and  
12 we're going to conclude with the document that separated  
13 the parcel from the physical surface connection to  
14 Middle River.

15 And there will be several transfers that  
16 occurred in the chain of title after that point. And  
17 although I don't believe they're material to this  
18 hearing, I will summarize them and list them just so  
19 that they're in the record.

20 So we'll go ahead and start with the first  
21 transfer which was the patent. I'm going to move fairly  
22 quickly through these and we'll stop and highlight a  
23 couple of the transfers that were important.

24 And I also needed to correct a couple dates as  
25 we move through here.

1           So the patent was from the State of California  
2 to J.P. Whitney, and the date is actually November 24th,  
3 1876. And that was -- that patent and my visual  
4 representation of the property transferred in the patent  
5 was submitted at Dunkel Exhibit 3A.

6           The important thing to remember from this  
7 patent is that it includes lands that are now the Dunkel  
8 parcel and in fractional section 1, and it clearly  
9 indicates that that larger parcel described in the  
10 patent was adjacent to Middle River, connected to Middle  
11 River.

12           That takes us to the second transfer. This is  
13 the deed from J.P. Whitney to M.C. Fisher, and the date  
14 on this is January 17, 1877. Again includes the current  
15 Dunkel parcel and again has language that indicates that  
16 the parcel described in the document is still adjacent  
17 to Middle River.

18           That brings us to transfer number three in the  
19 chain. This was from M.C. Fisher to Mr. Stewart,  
20 Mr. Bunten, and Mr. King. Again includes the current  
21 Dunkel parcel. And again describes the property as  
22 being directly adjacent to Middle River.

23           And that was Dunkel Exhibit 3C.

24           That brings to us to the fourth transfer. This  
25 is from Mr. Stewart, Mr. Bunten, and Mr. King to John

1 and E.W.S. Woods or the Woods brothers. Again includes  
2 the current Dunkel parcel and is connected to the Middle  
3 River.

4 The language in this particular description is  
5 a little bit different from the prior descriptions. It  
6 actually has a call to the right bank of Middle River  
7 and then another call in the deed running along the east  
8 bank of the river. We can see that the property is  
9 still clearly connected to Middle River.

10 That was submitted as Dunkel Exhibit 3D.

11 That brings us to the fifth transfer. This is  
12 an important one. This is from E.W.S. and Alice Woods  
13 to Jessie Wilhoit and Mary Douglass.

14 And again it includes the current Dunkel  
15 parcel. It also has those same calls to the right bank  
16 of the river and then meandering the right bank of the  
17 Middle River so we can see that the property is still  
18 connected.

19 I also would like to note, and I do this in my  
20 written testimony, that the deed contains a controlling  
21 call for the centerline of the main irrigation canal  
22 which indicates to me that the lands that contained the  
23 Dunkel parcel that are described in this document were  
24 being irrigated at this time.

25 And if we could, I'd like to ask Mr. Lindsay if

1 we could open this up this Exhibit. It's 3E. And I  
2 would just like to make a correction to the map I  
3 prepared of this document.

4 I just I want to clarify that this exhibit  
5 actually included some lands on the west that were not  
6 part of this transfer. They remained in the ownership  
7 of the other Woods brother.

8 And when we move to the next exhibit, you'll  
9 see what was included in here by mistake. So I wanted  
10 to clarify that for the record, and when we look at this  
11 next transaction, I think that will become more clear.

12 That brings us to the sixth transfer. That's  
13 from Jessie Wilhoit and Mary Douglass to E.L. Wilhoit,  
14 M.D. Eaton, and W.D. Buckley.

15 And that's Exhibit 3F, Mr. Lindsay. If you  
16 could open that, we'll look at it. And again I believe  
17 the map is on the last page.

18 So this deed has the same language indicating  
19 the property abutted Middle River as the previous deed.  
20 But as you can see, it doesn't include that portion to  
21 the west that was mistakenly included in the other deed,  
22 and it also includes the current Dunkel parcel. Touches  
23 the river, yeah. It Touches Middle River.

24 Okay. That takes us to the last transfer that  
25 we're going to talk about in detail today. That's

1 identified as Exhibit 3G.

2 This is an important transfer because it is the  
3 transfer that creates the separation to a direct surface  
4 connection to Middle River.

5 So if we could open that, Mr. Lindsay, and  
6 we'll look at the map. Map's on the last page.

7 So this is lot nine of the subdivision known as  
8 the Wilhoit and Douglass tract. A subdivision. This is  
9 lot nine of that subdivision.

10 As we can see, the Dunkel parcel, which is the  
11 majority of this lot nine today, no longer has that  
12 direct surface connection to the river but -- and I'll  
13 talk about it in a minute -- there's some other evidence  
14 that indicates that they maintained an ability to get  
15 water from the river.

16 I do want to point out -- and this is very  
17 important -- that this transfer that we're looking at  
18 here that created the separation from the direct surface  
19 connection to the river took place two months after the  
20 September 29, 1911 agreement to furnish water to the  
21 lands that included this parcel.

22 So that indicates to me that the owner of lot  
23 nine had maintained an ability to get water from the  
24 river because it was after that irrigation agreement was  
25 in place. So I want to make sure that's clear in the

1 record.

2           After transfer number seven, there's six  
3 additional transfers that bring us up to the current  
4 legal description of the property. We're not going to  
5 get into those in detail. They were submitted as  
6 Exhibit 3H, and I also list those transfers in my  
7 written testimony so hopefully there's no questions on  
8 that.

9           Now I would like to move on to the second part,  
10 the main part of my testimony which is the evidence that  
11 I would like to present to the Board that shows that the  
12 Dunkel parcel maintained an ability to get water from  
13 Middle River both before and after that separation we  
14 talked about on transfer number seven.

15           So there's three things I would like to look at  
16 today.

17           The first is a 1907-1908 map showing the Dunkel  
18 parcel as part of the lands that were irrigated by what  
19 I feel is a pretty extensive irrigation system.

20           Another map dated July 1914 that shows the  
21 Dunkel parcel immediately adjacent and connected to an  
22 interior island slough.

23           Then finally I just want to review and comment  
24 on some of the other testimony that's been submitted in  
25 this matter and some other matters before the Board that

1 I feel are relevant.

2 So if we could open up that -- I'm on paragraph  
3 15. I apologize if you guys are wondering where I'm at  
4 in the written testimony.

5 So in the rebuttal testimony presented in the  
6 Woods hearing, Stephen Wee provided a copy of a  
7 newspaper article in the Stockton Daily Independent, and  
8 I list the exhibit there in my testimony.

9 And we can see in the report there made by  
10 Mr. Gibbes that he identified a slough at the current  
11 location of the Woods diversion point and that was a  
12 fairly significant slough.

13 And Mr. Wee states in his testimony that that  
14 slough was to be dammed, but I just want to point out  
15 that we don't have any written record available to  
16 indicate when that slough was dammed or that it was  
17 dammed. So that's important and we'll be talking about  
18 that same body of water here in some more detail.

19 Moving on to paragraph 16 here, Mr. Wee also  
20 references an article in the Pacific Rural Press that  
21 speaks about the irrigation system that the Woods  
22 brothers installed, and this the system that was in  
23 place before that separation of the Dunkel parcel from  
24 Middle River.

25 It's in those -- the notes about that

1 irrigation system in the article, the article states  
2 that there was a substantial head gate being fixed in  
3 the levee at Middle River at the end of the canal. And  
4 that's that same canal we mentioned that was described  
5 by Mr. Gibbes.

6           So I believe this information helps us to see  
7 that this head gate was installed in the location of the  
8 current Woods Irrigation Company diversion structure and  
9 would have allowed the Dunkel parcel to obtain water  
10 directly from Middle River.

11           Moving on to paragraph 17. Mr. Moore in his  
12 testimony in the Woods Irrigation Company hearing before  
13 the Board identified a historic slough that ran in a  
14 northeasterly direction from Middle River adjacent to  
15 the Dunkel parcel.

16           And you know what, Mr. Lindsay, why don't we  
17 open up Exhibit 3F again just so I can show the Board  
18 what I'm talking about. I think it would be good to  
19 look at a picture. I think it's that last page again.

20           I'm sorry, Mr. Lindsay. Can I have you open  
21 3G? It's a little clearer on 3G. Thank you.

22           So if you look at the northwesterly boundary of  
23 lot nine which became the Dunkel parcel, you can see the  
24 slough that we're talking about here that Mr. Moore  
25 identified.

1           So it runs in a northeasterly direction from  
2 the current Woods Irrigation Company diversion point and  
3 then actually continues past the Dunkel parcel. So  
4 that's the body of water that we're talking about.

5           So when I put these three pieces of evidence  
6 together, the fact that Mr. Moore identified this as a  
7 slough in his research, we have the account from the  
8 surveyor and engineer, Mr. Gibbes, that there was  
9 actually a slough at this location, and we also have the  
10 newspaper article that indicates a head gate was  
11 installed, I believe we can combine that evidence and  
12 determine that the Dunkel parcel would have had an  
13 ability before and after it was separated from Middle  
14 River by that seventh transfer in the chain to still  
15 obtain water directly from Middle River, and I was told  
16 that was important.

17           Okay. We're going to look at a couple maps now  
18 that will provide some further evidence of what we just  
19 discussed.

20           The first one is the 1907-1908 map of the Woods  
21 brothers land.

22           And Mr. Lindsay, if I can, this was actually  
23 submitted as an exhibit in the Woods Irrigation Company  
24 hearing. So if we can go -- you may have it there.  
25 It's 6J. Do we have 6J? We do have 6J. Okay.

1           So this is the map that I'm referring to. The  
2 Dunkel parcel is -- if you go right to the center of the  
3 map and you move down towards the bottom, you can see  
4 the triangular piece that is the Dunkel parcel. And it  
5 abuts that same body of water we've been talking about.

6           I think we're getting a laser pointer so I can  
7 show -- yeah. That's it right there, Mr. Lindsay.

8 Thank you. We don't need a laser pointer. We've got  
9 Mr. Lindsay.

10           So this is the body of water we're talking  
11 about.

12           So I just want to point out that this map shows  
13 that in 1907-1908, which is when we dated this map --  
14 and I went into the detail about that in my Woods  
15 Irrigation Company hearing testimony -- that in  
16 1907-1908 there was a pretty extensive irrigation system  
17 here that would have allowed these lands to get water,  
18 and that would include the Dunkel parcel which is on one  
19 of the main irrigation lines that's shown on this map.

20           So the next map we want to look at is a 1914  
21 map of San Joaquin County. This is by Hendersen and  
22 Billwiller.

23           This is 6K, Mr. Lindsay. Thank you very much.  
24 And what we're actually going to do is I'm going to ask  
25 Mr. Lindsay when he gets done there -- can we go to the

1 next sheet? This is the overall map, but we've got a  
2 couple blow-ups here.

3 MR. HERRICK: I believe that's my fault.

4 MR. BLAKE: Can we zoom in there just a little  
5 bit, Mr. Lindsay?

6 Okay. If we can, Mr. Lindsay, maybe you can  
7 zoom in just this area right here which is the Dunkel  
8 parcel.

9 So this shape right here, this triangular shape  
10 to the northwest of the Woods Irrigation Company  
11 diversion, that's basically lot nine of that subdivision  
12 we talked about.

13 Remember lot nine was created with the transfer  
14 that separated the Dunkel ownership from that direct  
15 connection to Middle River.

16 So we can see here that same slough that we've  
17 been talking about that comes off Middle River, runs  
18 northeast.

19 And just to be clear -- and I know this was  
20 brought up in the Woods hearing -- but we know this is a  
21 slough, first of all from information in the legend  
22 which was in the previous sheet. But you can also see  
23 this is clearly a bridge over this body of water for  
24 this road here.

25 And we can see that the Dunkel parcel clearly

1 is connected to this slough that comes right off of  
2 Middle River.

3 So I just want to show you this is that 1914  
4 map. And this confirms the information that was shown  
5 on the previous map we looked at, the 1907-1908 map.

6 I also want to just point out for the record  
7 that the same slough is also shown on the 1911 Stockton  
8 USGS quad map or seven and a half minute quadrangle map.  
9 So we can see it in that 1911 map as well.

10 I personally visited the current Woods  
11 Irrigation Company diversion point and have witnessed an  
12 old brick floodgate that's put through the center of the  
13 levee and is likely a descendant or the gate that was  
14 installed when they originally dammed off that slough.

15 So it's pretty clear to me that there was  
16 always an attempt to move water from Middle River along  
17 this slough here that runs to the northeast.

18 So we're on paragraph 23 now of my written  
19 testimony.

20 So just to provide a summary at this point, I  
21 believe that the evidence shows that not only did the  
22 Dunkel parcel maintain that direct surface connection to  
23 Middle River up to and past the date of the 1911  
24 agreement to furnish water, but after it was separated  
25 from the river, it maintained an ability to get water

1 from Middle River through that irrigation system and  
2 that canal that comes off of Middle River. So that's  
3 important.

4 So any subsequent transfer of the property  
5 after that seventh transfer that we talked about is  
6 really not going to be of consequence, in my opinion,  
7 because the parcel had maintained that ability. The  
8 evidence shows that there was an intent to maintain the  
9 ability to pull water from Middle River.

10 Paragraph 24. Just point out that in reaching  
11 these conclusions I've relied on the testimony of  
12 Mr. Nomellini who states that the standard practice in  
13 the Delta when you dammed a slough like that -- and this  
14 is the slough that runs northeast along the Dunkel  
15 parcel -- the standard practice of Delta farmers was to  
16 put in a sluice gate or a head gate.

17 We've got evidence in the record that indicates  
18 that there was actually a head gate at that location.  
19 In fact, to this day, there's still a head gate at that  
20 location which would have preserved that ability to pull  
21 water out of Middle River.

22 The last part of my testimony, I just want to  
23 take an opportunity to clarify what I believe was an  
24 error in the record. This was in the previous testimony  
25 that was presented by Mr. Wee in the Dunkel hearing.

1           And on page 3, the first full paragraph of  
2 exhibit MSS-1 of the hearing, Mr. Wee identified that  
3 the transfer from E.W.S. and Alice Woods to Jessie  
4 Wilhoit and Mary Douglass separated the parcel from the  
5 river, and that is incorrect.

6           Just for clarity, why don't I relate that to  
7 the transfer that I described. That would be transfer  
8 number five.

9           So that's incorrect. Transfer number five did  
10 not separate the parcel. The parcel was actually not  
11 separated from that direct surface connection to Middle  
12 River until transfer number seven in the chain.

13           That's an important distinction because  
14 transfer number seven is after, two months after that  
15 agreement to furnish irrigation water between Woods  
16 Irrigation Company and Mary -- and Mary Wilhoit and  
17 Jessie Douglass.

18           So that's an important distinction that we need  
19 to make.

20           So I just want to make sure that's clear in the  
21 record that transfer number five that Mr. Wee said  
22 separated the parcel actually contains controlling  
23 calls, as we discussed, that show the parcel was  
24 connected to the river. There is a call to the right  
25 bank of Middle River and meandering the right bank of

1 Middle River.

2           So there's no question in my mind when I  
3 interpret that deed as a land surveyor that that parcel  
4 it describes was definitely connected to Middle River.  
5 So we want to make sure that's clear.

6           And I believe Mr. Wee actually went back in and  
7 attempted to correct that error. In pages 23 to 25 of  
8 Exhibit MSS-R 14 he states that the 700-acre parcel  
9 which contains the Dunkel property was the only parcel  
10 that remained riparian through 1911.

11           And I just want to make sure that everybody  
12 understands that that's correct, that it was the seventh  
13 transfer in the chain.

14           CO-HEARING OFFICER HOPPIN: Just so the  
15 record's correct, and I don't think it makes any  
16 difference, but unless I was in a dyslexic moment, I  
17 think you transposed the names of Douglass and Wilhoit.  
18 I think you had Mary Wilhoit and Jessie Douglass.

19           MR. HERRICK: He did state that backwards.

20           MR. BLAKE: I do that frequently. I appreciate  
21 you correcting me on that.

22           CO-HEARING OFFICER HOPPIN: I used to do that  
23 when I was making change, and it was even more expensive  
24 than what you did.

25           MR. BLAKE: I'm sure the girls would be

1 offended if they were here, so I appreciate you  
2 correcting that.

3           Okay. Just to conclude what I stated at the  
4 beginning of my testimony: When I examine the  
5 information in the chain of title, I look at the maps  
6 and the newspaper articles that were presented, the  
7 Dunkel parcel was directly connected to Middle River up  
8 until and beyond the 1911 -- September 29, 1911  
9 agreement to furnish water, and after that agreement  
10 still maintained, I believe, an ability to directly draw  
11 water from Middle River through the slough and the  
12 irrigation system that was in place.

13           So that concludes the summary of my testimony.

14           MR. HERRICK: Mr. Blake, let me just ask you  
15 one more question.

16           You say the existence of the irrigation  
17 facilities maintained that connection after the surface  
18 connection, but wasn't that connection through the  
19 irrigation facilities established well before 1911?

20           MR. BLAKE: Yeah. I want to be clear: The  
21 ability to get water to the Dunkel parcel was in place  
22 well before the 1911 agreement to furnish water and also  
23 well before the parcel was separated from the river.

24           And I believe that was intentional. I don't  
25 believe it's reasonable to conclude that they would have

1 sold that parcel before the agreement to get water to it  
2 was in place.

3 And in fact, the record shows they waited until  
4 that agreement was in place to transfer lot nine which  
5 became the Dunkel parcel.

6 So the ability to get water from Middle River  
7 was in place before the parcel was separated from Middle  
8 River and remained in place after that date. So that's  
9 good that we clarified that.

10 MR. HERRICK: Thank you.

11 Mr. Nomellini, would you please briefly  
12 summarize your testimony?

13 MR. NOMELLINI: Yes.

14 First of all, Exhibit 9 is a true and correct  
15 copy of my testimony. It includes the declaration that  
16 I submitted in support of the motion to reopen the  
17 hearing.

18 I think that it is important to note the key  
19 feature upon which Mr. Wee based his conclusion that  
20 this parcel did not have riparian rights has been  
21 retracted as being an error on his part. My review  
22 pointed that out in my declaration.

23 I looked further at the various materials that  
24 have been testified to here and will not repeat it all,  
25 but under any theory that you can apply that I know of

1 to this parcel, this parcel retains its riparian  
2 character.

3 First of all, and you have heard me before, say  
4 that swamp and overflow lands were appurtenant to the --  
5 contiguous to the Delta pool and only separated by  
6 levees and reclamation and drainage, and I don't think  
7 that constitutes a basis for a legal severance.

8 I realize there may be some legal argument on  
9 that, but this parcel is swamp and overflow as shown in  
10 the patent.

11 This parcel also abuts what I view as a natural  
12 channel or slough that preexisted the separation into a  
13 separate parcel and never was --

14 (Interruption; building announcement)

15 CO-HEARING OFFICER BAGGETT: Let's go back on  
16 the record. Proceed.

17 MR. NOMESELLINI: I think it's correct, and it  
18 fits my understanding of the practice in the Delta was  
19 that when we encountered these sloughs that the people  
20 originally reclaimed, the general practice was to insert  
21 some type of floodgate structure in there, and therefore  
22 there would have been a continuous connection of water.

23 Going to this particular parcel, this parcel if  
24 you look at it today as displayed by the maps and in the  
25 field, you'll see that it continues to abut what is now

1 a distribution channel for the Woods Irrigation Company  
2 that follows the alignment of where we think the slough  
3 was.

4 And there's other corroborating evidence as  
5 well. The Gibbes report that was quoted in the  
6 newspaper article cited by Mr. Wee confirms a gate and  
7 extension of canals in that location in my opinion that  
8 was building on an existing system.

9 But even if it wasn't, the character of this  
10 property continues to be riparian.

11 And I agree that when it became a parcel the  
12 Woods Irrigation Company system was in place and the  
13 agreements to deliver water in place.

14 So when it became that parcel, there was no  
15 disconnect, no evidence of any intent to sever the  
16 riparian right.

17 And I think also the transfer cited by Mr. Wee  
18 was of a partial interest in the property. That doesn't  
19 constitute the severance of a parcel.

20 In other words, if you have two common owners  
21 have an interest where one half interest gets  
22 transferred, that doesn't separate the parcel because  
23 the other owner still has the continuous ownership.

24 And it wasn't until the decree of distribution  
25 in the estate of John Newton Woods that the parcel went

1 to the daughters, and it would have been at that time  
2 that it would have been created as a separate parcel.

3 And the law in my opinion is clear that where  
4 you have an estate transaction of that type where you're  
5 dividing up the family property, it would take some  
6 clear indication in the court decree to say there was a  
7 reservation of -- a withholding of the riparian right;  
8 otherwise, it would be assumed to go with it. It's like  
9 partitions in that body of law.

10 So I don't know of any basis that would  
11 conclude that this parcel is not riparian today.

12 That concludes my testimony.

13 MR. HERRICK: Thank you, Mr. Nomellini.

14 I was remiss. Mr. Nomellini, Exhibit 5 is a  
15 true and correct copy of your statement of  
16 qualifications and 9 is your testimony; is that correct?

17 MR. NOME LLINI: That's correct.

18 MR. HERRICK: And Mr. Blake, Exhibits 3 and  
19 attachments and Exhibit 4 are a true and correct copy of  
20 your testimony and statement of qualifications; is that  
21 correct?

22 MR. BLAKE: That's correct.

23 MR. HERRICK: Thank you.

24 That's all we have for direct.

25 CO-HEARING OFFICER BAGGETT: Thank you.

1 Cross-examination. Prosecution?

2 --o0o--

3 CROSS-EXAMINATION BY MR. ROSE

4 FOR PROSECUTION TEAM

5 --o0o--

6 MR. ROSE: Good afternoon. David Rose for the  
7 Prosecution Team. Just a few questions, I believe all  
8 directed at Mr. Blake.

9 Briefly, you testified that your evidence  
10 supports that the Dunkel property was irrigated prior to  
11 severance of the parcel in 1911; is that correct?

12 MR. BLAKE: I believe there's evidence to show  
13 that it was irrigated prior to 1911, yes.

14 MR. ROSE: Do you mean that it could have been  
15 irrigated or that it was irrigated?

16 MR. BLAKE: Well, I -- all I can state for a  
17 fact, it was adjacent to a body of water, an interior  
18 slough.

19 MR. ROSE: Okay. So your evidence goes to  
20 whether it could have been irrigated; is that correct?

21 MR. BLAKE: I didn't find any direct statements  
22 that the parcel was irrigated in my research that I can  
23 recall.

24 MR. ROSE: Okay. Then just one other question.  
25 Did you provide any of the information you

1 presented today to the division prior to issuance of the  
2 Draft Cease and Desist Order?

3 MR. BLAKE: You'll have to forgive me. I don't  
4 remember exactly what was submitted. But I know a large  
5 part of this chain of title research took place after  
6 that original submittal. So that would not have been  
7 submitted before the CDO.

8 MR. ROSE: Okay. Thank you.

9 No further questions.

10 CO-HEARING OFFICER BAGGETT: Mr. O'Laughlin?

11 MR. O'LAUGHLIN: Thank you Hearing Officer  
12 Baggett. We're going to start with Mr. Rubin, and if I  
13 have any cleanup questions, I'll go shortly after.  
14 Thank you.

15 --o0o--

16 CROSS-EXAMINATION BY MR. RUBIN

17 FOR SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

18 --o0o--

19 MR. RUBIN: Good afternoon, Mr. Blake,  
20 Mr. Nomellini. My name is Jon Rubin. I'm an attorney  
21 for the San Luis & Delta-Mendota Water Authority. I  
22 have a few questions for you both.

23 Let me start by asking a question regarding --  
24 a general question. As I understand it, Mr. Blake, you  
25 were part of a team that developed evidence for purposes

1 of defending the Dunkels against the Draft Cease and  
2 Desist Order issued by the State Water Resources Control  
3 Board?

4 MR. BLAKE: What I was asked to do, Mr. Rubin,  
5 was to examine the chain of title to see when the parcel  
6 was separated from a direct connection of Middle River,  
7 and that's a pretty factual analysis. I don't think  
8 there's a lot of interpretation there.

9 MR. RUBIN: I understand that, Mr. Blake.

10 But you along with others were charged with  
11 developing evidence to assist in the defense of a Cease  
12 and Desist Order issued against the Dunkels?

13 MR. BLAKE: I think that's true. But I want to  
14 clarify that if my research had indicated that the  
15 parcel would have been separated sooner in the chain of  
16 title, I would have presented that evidence.

17 MR. RUBIN: I'm not doubting that.

18 MR. BLAKE: Okay.

19 MR. RUBIN: I just want to -- I'm trying to get  
20 an understanding of the process that led to the  
21 preparation of your testimony today.

22 As an example, you relied upon testimony that  
23 Mr. Nomellini presented to the State Water Resources  
24 Control Board today, correct?

25 MR. BLAKE: That is correct.

1           MR. RUBIN: Was there anyone else that you  
2 talked to, conferred with, as you developed your  
3 testimony today?

4           MR. BLAKE: Other than the legal counsel  
5 representing the Dunkels, I don't recall any specific  
6 conversations on this particular matter before the  
7 Board, no.

8           MR. RUBIN: And specifically, when you  
9 reference legal counsel, are you speaking about  
10 Mr. Herrick?

11          MR. BLAKE: That is correct.

12          MR. RUBIN: And on page 1 of your written  
13 testimony, which I believe is marked Dunkel Exhibit 3,  
14 you indicate that you were told a conclusion about  
15 riparian rights may be drawn from evidence.

16           Do you see that statement?

17          MR. BLAKE: Yes, I do.

18          MR. RUBIN: Was it Mr. Herrick who told you  
19 that a conclusion may be drawn about riparian rights?

20          MR. BLAKE: That's correct.

21          MR. RUBIN: As you prepared your testimony, did  
22 Mr. Herrick or any one else that you conferred with  
23 indicate that the Dunkels were asserting a riparian  
24 right as a part of their defense to the Draft Cease and  
25 Desist Order issued by the State Water Resources Control

1 Board?

2 MR. BLAKE: I don't remember any specific  
3 statements, Mr. Rubin, but I think I had that general  
4 understanding when I began my work, you know, that I had  
5 to be provided the criteria, you know, why is the  
6 research I'm doing important. So I did have some  
7 understanding of that, yes.

8 MR. RUBIN: Is it your understanding that the  
9 Dunkels assert that they have a pre-1914 water right as  
10 well that supports irrigation on the property at issue  
11 in this proceeding?

12 MR. BLAKE: I don't believe I was involved with  
13 any discussion about whether or not the Dunkels had a  
14 pre-1914 right.

15 I was specifically asked to look at historical  
16 documents and deeds in the title that may show a  
17 riparian right.

18 MR. RUBIN: Mr. Nomellini, is it your  
19 understanding that the Dunkels assert a pre-1914 water  
20 right as part of their defense to the Draft Cease and  
21 Desist Order?

22 MR. NOME LLINI: That's my understanding, yes.

23 MR. RUBIN: And so is it your understanding  
24 that the Dunkels assert that they can irrigate the  
25 property at issue in this proceeding under either a

1 pre-14 water right or a riparian right?

2 MR. NOME LLINI: Correct. I think that's my --  
3 my understanding, and it would be my contention, that  
4 they have such rights.

5 MR. RUBIN: And you are appearing today.

6 (Interruption; building announcement)

7 MR. RUBIN: Mr. Nomellini, you are appearing  
8 today on behalf of the Dunkels?

9 MR. NOME LLINI: I am as a witness, yes.

10 MR. RUBIN: Mr. Blake, in your testimony, you  
11 reference an intent for the Dunkel parcel on page 1 of  
12 your testimony, Exhibit 3; is that correct?

13 MR. BLAKE: I speak about evidence of intent,  
14 yes.

15 MR. RUBIN: And that is an intent to maintain a  
16 connection between the property and a watercourse; is  
17 that correct?

18 MR. BLAKE: Yeah, that's correct.

19 MR. RUBIN: And the evidence -- whose intent do  
20 you believe the evidence reflects?

21 MR. BLAKE: Well, I believe it was clear to me  
22 based on the documents in the record that -- let me make  
23 sure I get the names right -- Jessie Wilhoit and Mary  
24 Douglas, you know, the intent was to make sure that the  
25 parcels they created as part of that subdivision -- and

1 lot nine was just one of several parcels; I think there  
2 was over 20 -- that those parcels had an ability to get  
3 water before the land was subdivided.

4 And I think that the evidence of that is not  
5 only that the evidence of the irrigation system that was  
6 in place before that subdivision occurred but also the  
7 fact that the deed in this case for lot nine wasn't  
8 transferred until after the September 29, 1911 agreement  
9 was in place.

10 MR. RUBIN: Let me ask you about that, because  
11 I believe you testified on direct that there was an  
12 indication that the severance at issue that occurred I  
13 believe on November 29, 1911 --

14 MR. HERRICK: Mr. Blake did not testify to  
15 severance because that's -- he was cautioned that that  
16 may be used as a legal term.

17 MR. RUBIN: There was a -- let me restate my  
18 question.

19 There was a transfer that occurred on  
20 November 29, 1911, correct?

21 MR. BLAKE: Yeah, that's correct.

22 MR. RUBIN: And this was -- the transfer that  
23 occurred on November 29, 1911 is the transfer that you  
24 believe reflects an intent to maintain a connection --

25 MR. BLAKE: Well --

1           MR. RUBIN:  -- between -- let me finish my  
2 question --

3           MR. BLAKE:  Sorry.

4           MR. RUBIN:  -- Mr. Blake.

5           -- maintain a connection between a watercourse  
6 and the parcel at issue; is that correct?

7           MR. BLAKE:  I don't know if that's correct, so  
8 let me clarify.

9           Transfer number seven, which is the transfer  
10 we're speaking about in my testimony, was the transfer  
11 that removed what would become the Dunkel parcel from a  
12 direct surface connection to Middle River.

13          MR. RUBIN:  And you believe that because that  
14 happened several months after the 1911 Woods agreement  
15 was executed, that reflects an intent?

16          MR. BLAKE:  As a -- I'm not an attorney.  But  
17 as a land surveyor researching that chain of title, I  
18 would conclude that the reason the transfer occurred two  
19 months after the irrigation agreement was because there  
20 was an understanding that they didn't want to separate  
21 the parcel without a means to provide water.

22           I think that answers your question.  I hope it  
23 does.

24          MR. RUBIN:  And your answer just referenced an  
25 understanding amongst the parties.  Is there anything in

1 the documents that reflects the understanding as you  
2 just presented it?

3 MR. BLAKE: Other than the transfers themselves  
4 and the other maps that we talked about, no, I don't  
5 have a direct written document that says we're doing  
6 this because of this.

7 MR. RUBIN: Okay. Now, let's talk a little bit  
8 about what I think you characterized as a slough, and  
9 specifically the water feature that is to the north of  
10 the parcel at issue.

11 Are you -- do you understand the focus of my --

12 MR. BLAKE: I know which body of water you're  
13 talking about.

14 MR. RUBIN: You have referred to that body of  
15 water as a slough?

16 MR. BLAKE: That's correct.

17 MR. RUBIN: Is it your understanding that that  
18 body of water is a natural body of water or an  
19 artificial, human-made body of water?

20 MR. HERRICK: May I just ask for clarification?  
21 As of what time, what date?

22 MR. RUBIN: As of 1850, was there a natural  
23 watercourse at the location we've been describing?

24 MR. BLAKE: I believe based just on the report  
25 by Mr. Gibbes that there was a natural slough at that

1 location, yes.

2 MR. RUBIN: And which report from Mr. Gibbes  
3 are you referring to?

4 MR. BLAKE: Give me a minute, I'll identify it.  
5 That's described in paragraph 15 of my  
6 testimony on page 5. And Mr. Gibbes describes two open  
7 sloughs on Roberts Island, one of them being the slough  
8 in Section 1 which is the location of the current Woods  
9 Irrigation Company diversion point.

10 And I don't have it right in front of me,  
11 Mr. Rubin, but I believe he gives a width and depth of  
12 that slough at that point.

13 MR. RUBIN: And does Mr. Gibbes in his report  
14 that's described in paragraph 15 of your written  
15 testimony, Exhibit 3, indicate whether that slough is  
16 natural or whether it may have been created by human?

17 MR. BLAKE: No, he does not. But since the  
18 report was -- the purpose of the report was to describe  
19 how Roberts Island could be reclaimed. So my conclusion  
20 based on that fact would be that the slough was in place  
21 before reclamation of the island and would be a natural  
22 body of water.

23 MR. RUBIN: Let's assume for purposes of my  
24 questioning that in 1875 -- well, let me ask you this  
25 question first.

1           Mr. Gibbes' report that's referenced in  
2 paragraph 15 of your written testimony, Exhibit 3, was  
3 prepared in 1875?

4           MR. BLAKE: Well, it appeared in an 1875  
5 article of the newspaper, so that's correct. I'm not  
6 sure exactly when the report itself was prepared but it  
7 was presented in an 1875 newspaper article.

8           MR. RUBIN: Do you believe that the description  
9 that Mr. Gibbes provided indicated the conditions in  
10 1875?

11          MR. BLAKE: 1875 or close to 1875, yeah.

12          MR. RUBIN: So let's -- for purposes of my  
13 questioning, let's assume that Mr. Gibbes was describing  
14 the conditions in 1875. Let's also assume that the  
15 water feature that we've been discussing is a natural  
16 watercourse.

17          The parcel that is now owned by the Dunkels  
18 would have been adjacent to the watercourse that we've  
19 been discussing, correct?

20          MR. BLAKE: That's correct. Just to be clear,  
21 the parcel didn't exist at that time; but that land was  
22 adjacent to that body of water, yes.

23          MR. RUBIN: If the parcel was being irrigated  
24 in 1875, would it have been realistic for that parcel to  
25 be diverting water from the watercourse that we've just

1 described that abuts the parcel to the north?

2 MR. BLAKE: Mr. Rubin, I don't think I can  
3 answer that question. I don't have any knowledge of  
4 irrigation on that parcel in 1875, if it was happening  
5 or not happening.

6 MR. RUBIN: Okay. Do you have any indication  
7 of whether that parcel was irrigated at any time prior  
8 to 1914?

9 MR. BLAKE: Yeah, I believe I have some  
10 evidence of that. I believe there's the 1907-1908 map  
11 that shows that the parcel was part of lands being  
12 served by an irrigation system.

13 I also have the 1911 agreement to furnish  
14 water.

15 So I believe there is some evidence that the  
16 lands that contained the Dunkel parcel were being  
17 irrigated before 1914, yes.

18 MR. RUBIN: Do you have any indication that  
19 water was being diverted directly from Middle River into  
20 a canal, not the watercourse that we've been discussing  
21 that runs to the immediate north of the Dunkel property?

22 MR. HERRICK: I'm sorry. Could you repeat that  
23 question? I didn't understand that.

24 MR. BLAKE: Yeah, I would like to have it  
25 repeated if you could.

1           MR. RUBIN: Mr. Blake, if you didn't understand  
2 the question, I will try to --

3           MR. BLAKE: Let me listen one more time.

4           MR. RUBIN: Let me ask you a foundational  
5 question. Is it your opinion that the parcel that is  
6 now owned by the Dunkels diverts water from the  
7 watercourse that abuts the property to the immediate  
8 north?

9           MR. BLAKE: Today?

10          MR. RUBIN: That is correct.

11          MR. BLAKE: You know, Mr. Rubin, I'm not sure  
12 how the parcel today gets water. I'm not sure if they  
13 do that immediately -- to the body of water that's  
14 immediately to the north or through another means.

15          MR. RUBIN: Do you know if at any time the  
16 parcel received water from the watercourse that existed  
17 immediately to the north?

18          MR. BLAKE: I don't have any direct evidence of  
19 that, although I think it's a logical conclusion if your  
20 parcel sits on a parcel of water I don't think you're  
21 going to go through a great deal of effort to get water  
22 from another source.

23                 But I don't have a direct written document that  
24 indicates that.

25          MR. HERRICK: Mr. Chairman, I would object to

1 these questions. These were asked and answered of a  
2 prior witness in this very hearing, Mr. Gino Celli, who  
3 testified directly that the land receives water from  
4 this watercourse that abuts it on its northwestern side.

5 I'm not sure of the purpose of these questions  
6 for Mr. Blake, but they've already been asked and  
7 answered by another witness by Mr. Rubin.

8 CO-HEARING OFFICER BAGGETT: True.

9 MR. RUBIN: I guess my first response is Mr.  
10 Blake has already answered the question.

11 The second is Mr. Blake's testimony is clearly  
12 intended to provide information about the Dunkel  
13 property, and specifically whether the Dunkel property  
14 has a riparian right to Middle River.

15 And my questioning is trying to understand  
16 whether there may be a right -- a riparian right to  
17 Middle River versus this water body that exists  
18 immediately to the north which is a different feature.

19 MR. HERRICK: Mr. Chairman, besides not making  
20 any sense, let me make a general objection here.

21 It appears that counsel is going to go through  
22 a number of questions on peripheral issues when their  
23 side has presented no evidence contrary to the fact that  
24 the parcel was connected to Middle River after the  
25 September 29, 1911 agreement.

1           So if they have some sort of theory or factual  
2 issue with the riparian rights that's been alleged,  
3 that's fine.

4           But I fear we're just wasting everybody's time,  
5 and we're going to end up with somebody saying, well,  
6 nobody proved a pre-1914, which to me is an unethical  
7 attempt to make the client of mine spend extra time and  
8 money when everybody now has the facts in front of them  
9 indicating a clear riparian right.

10           CO-HEARING OFFICER BAGGETT: Do you have a --

11           MR. RUBIN: Again, Mr. Blake answered my  
12 question. I'll turn to some other questions that I  
13 have.

14           CO-HEARING OFFICER BAGGETT: I'll overrule the  
15 objection, but I'd like you to just get to the point. I  
16 would agree it's starting to get repetitive. Continue.

17           MR. RUBIN: Mr. Blake, in any of the title  
18 documents that you reviewed, was there any indication  
19 that the parcels were being irrigated at the time the  
20 title documents were prepared?

21           MR. BLAKE: Well, let me point out -- and I  
22 believe I mentioned this in my direct -- let me find the  
23 language, Mr. Rubin.

24           Transfer number five, the description of the  
25 parcel that contained the current Dunkel parcel had a

1 call, controlling call, to the centerline of a main  
2 irrigation canal.

3 I'm not an irrigation expert, but as a surveyor  
4 interpreting that call, that indicates to me that the  
5 lands that included the Dunkel parcel were being  
6 irrigated.

7 MR. RUBIN: Okay. Is there any other title  
8 document that you believe reflected irrigation --  
9 surface irrigation occurring at the time the deed  
10 document was prepared?

11 MR. BLAKE: Let me think about your question  
12 for a minute.

13 Just to be clear, that same language that we  
14 just discussed appears in subsequent transfers in the  
15 chain of title. So aside from that, I don't remember  
16 any other language in the deeds in the chain of title  
17 that dealt specifically with irrigation of the land.

18 MR. RUBIN: Thank you.

19 I have no further questions.

20 --o0o--

21 CROSS-EXAMINATION BY MR. O'LAUGHLIN

22 FOR MODESTO IRRIGATION DISTRICT

23 --o0o--

24 MR. O'LAUGHLIN: Good afternoon, gentleman. My  
25 name is Tim O'Laughlin representing Modesto Irrigation

1 District.

2 My first question is for Mr. Blake. Do you  
3 want to pull up one of your overhead exhibits showing  
4 where the Dunkel property is located? Pick one that  
5 shows it pretty clear.

6 MR. BLAKE: I think 3G was a good one.

7 MR. O'LAUGHLIN: Okay. Now you're a surveyor,  
8 and let me ask have you been out to the actual property  
9 to look at it?

10 MR. BLAKE: I've been to this general vicinity.  
11 I don't know that I necessarily walked the boundaries of  
12 this particular parcel.

13 MR. O'LAUGHLIN: Okay. Would you be able to  
14 tell us from -- let us assume that the canal goes to the  
15 headworks there on Middle River. How far is it from  
16 Middle River where the canal starts to the far northeast  
17 corner of the property where the canal leaves where it  
18 connects to the Dunkel property? How far is that about?

19 MR. BLAKE: You know that -- I don't have the  
20 tools I need for an exact measurement. I'm going to say  
21 a few hundred feet.

22 MR. O'LAUGHLIN: Few hundred feet.

23 MR. BLAKE: Yeah. Couple to few hundred feet.

24 MR. O'LAUGHLIN: Now when you read -- Mr. Wee  
25 submitted an article, and it talked about a canal that

1 was built for a half mile long. Did you understand  
2 that?

3 MR. BLAKE: I do remember that. I could  
4 probably answer more specific questions if I knew which  
5 exhibit we were referring to.

6 MR. O'LAUGHLIN: That's fine. So would it be  
7 your opinion that the Dunkel property would be located  
8 within the first half mile of that canal where it was  
9 built by Woods?

10 MR. BLAKE: Yeah, that's reasonable.

11 MR. O'LAUGHLIN: Okay. Thank you. All right.

12 Now, in regards to the slough, do you have an  
13 understanding or can you point us to a document as to  
14 when the levees were completed along Middle River in the  
15 vicinity of the Dunkel property in the time period in  
16 which those were completed?

17 MR. BLAKE: I don't know what date, exact date,  
18 the levees were constructed, no.

19 MR. O'LAUGHLIN: Okay. So do you -- if the  
20 testimony by Mr. Wee is that they were completed  
21 approximately 1875 or 1876, would you have any reason to  
22 disagree with that assertion?

23 MR. BLAKE: Based upon my review of his  
24 testimony, I didn't see any document or other direct  
25 evidence. But if he presented that, and I had an

1 opportunity to review it, I may very well agree with the  
2 date of construction of those levees.

3 MR. O'LAUGHLIN: Now I'm confused in your  
4 testimony. Are you saying that the levee wasn't  
5 completed across where this slough hydraulically  
6 connected to Middle River? Or are you saying that when  
7 the levee was completed that your belief is that a  
8 sluice gate or something was put in? Which one is it?  
9 I'm perplexed.

10 MR. BLAKE: I believe, based on standard  
11 practices in the Delta and the evidence that I have seen  
12 not only in the documents but on the ground today, that  
13 there was a sluice gate or head gate of some type  
14 installed at this location as early as -- if you give me  
15 a second I can find the exact date.

16 MR. O'LAUGHLIN: That's the article that talks  
17 about the building of the annual and the main head gate  
18 that's installed?

19 MR. BLAKE: Substantial head gate.

20 MR. O'LAUGHLIN: Substantial head gate.

21 Do you have any evidence of any earlier head  
22 gate or sluice gate being installed in that location to  
23 maintain a hydraulic connection between this parcel  
24 along where the slough is with Middle River?

25 MR. BLAKE: I don't have any direct documentary

1 evidence of that.

2 MR. O'LAUGHLIN: Okay. So if --  
3 hypothetically, if the levee was built in 1875 or 1876,  
4 without a head gate or sluice, the next earliest time  
5 frame we would have is when the main canal was built, is  
6 that correct? When the substantial head gate was  
7 installed?

8 MR. HERRICK: Could I ask for clarification. I  
9 don't know what you mean by the next earliest time  
10 frame. I don't --

11 MR. O'LAUGHLIN: Okay.

12 Well, if the levee was built, and no sluice or  
13 head gate was installed in 1875 or 1876, the earliest  
14 documentation you have of a head gate installed is the  
15 one where the main canal is, correct?

16 MR. BLAKE: That's correct.

17 MR. O'LAUGHLIN: Okay. Now in regards to the  
18 main canal, do you know if there was one head gate  
19 installed or two head gates?

20 MR. BLAKE: I don't have knowledge of whether  
21 there was one or two.

22 MR. O'LAUGHLIN: Okay. Do you have a -- you  
23 said the head gate that you looked at may be a likely  
24 descendant. So do you know if the head gate that we can  
25 currently view out there is in fact a subsequent head

1 gate or the actual head gate that was installed?

2 MR. BLAKE: I don't know if it's the actual  
3 head gate from the 1876 article or a subsequent one.

4 MR. O'LAUGHLIN: Okay. Now, when you read the  
5 article -- and you can turn to it in your testimony if  
6 you like. In the article that was written when the  
7 canal was built a half mile inland, it said it was going  
8 to serve the lowlands in the interior of Middle Roberts  
9 Island; is that correct?

10 MR. BLAKE: I think I need to look at that.

11 MR. O'LAUGHLIN: Sure.

12 MR. BLAKE: Give me a second.

13 MR. O'LAUGHLIN: That would be fine.

14 MR. BLAKE: Do you have exhibit number?

15 MR. O'LAUGHLIN: I don't.

16 MR. BLAKE: That's all right. I'll find it.  
17 I've got it.

18 MR. O'LAUGHLIN: You've got it?

19 Okay. Take your time and look at it.

20 MR. BLAKE: We're getting a blow-up.

21 MR. O'LAUGHLIN: Sure. Do we have an exhibit  
22 number?

23 MR. BLAKE: MSS WIC Exhibit No. 5.

24 MS. GILLICK: I believe it is 14. MSS-R 14.

25 And it will be Exhibit No. 5 within that.

1 MR. O'LAUGHLIN: I think --

2 MS. GILLICK: It should be Exhibit No. 5  
3 attached to that. I think it will be within the  
4 document. I'm not sure. I didn't go to the website to  
5 see what was up there. Exhibit No. 5 within that.

6 MR. O'LAUGHLIN: And I want to point your  
7 attention to the -- is it your understanding that they  
8 did a survey and found out that actually the lands  
9 within Lower Roberts Island in the interior were lower  
10 than the water surface elevation in Middle River?

11 MR. BLAKE: I don't know if they did a survey,  
12 but I can see the statement you're referring to in the  
13 article. It says:

14 The reclaimed lands are basin shaped  
15 being lowest at the center of the tract  
16 and highest next to the river bank.

17 MR. O'LAUGHLIN: Okay. So if the water was to  
18 run through this half mile inland before the water could  
19 be conducted out over the surface of the farm, that  
20 would mean that in fact if we've already identified that  
21 Dunkel is within the first half mile that the water  
22 would not run over the Dunkel property; is that correct?  
23 Based on this article.

24 MR. BLAKE: I would -- like I said, I'm not an  
25 expert at irrigation. But I would assume you'd have to

1 have, you know, some way to get the water onto the  
2 Dunkel land, yeah.

3 MR. O'LAUGHLIN: Okay. And if it was a gravity  
4 system and there were no pumps, then the two ways to do  
5 that would be either by siphon or by having your lands  
6 lower than the elevation of the water surface elevation;  
7 is that correct?

8 MR. BLAKE: Yeah.

9 Let me clarify that though for a second,  
10 Mr. O'Laughlin, because the problem with being able to  
11 answer your question confidently is that I really don't  
12 have any indication of the limits of the high ground or  
13 the basin or the contours, so it's difficult for me to  
14 answer specific questions about the relationship between  
15 the elevation of the Dunkel lands and elevation of the  
16 water in the channel.

17 MR. O'LAUGHLIN: Okay. Would that answer hold  
18 true as well for your belief that you could in fact  
19 irrigate the property because if you don't know the land  
20 surface elevation and the water surface elevation, while  
21 a canal could be going past the property, it may not be  
22 possible to in fact serve the property?

23 MR. BLAKE: I can't tell you for a fact that  
24 the elevation of the Dunkel parcel was lower or higher  
25 than the elevation of the water in the canal; that's

1 correct.

2 MR. O'LAUGHLIN: Thank you.

3 Mr. Nomellini, I have a couple -- well, Mr.  
4 Blake. Were you given criteria by Mr. Nomellini or  
5 Mr. Herrick or someone in your group for determining the  
6 riparian nature of a parcel?

7 MR. BLAKE: No. I was told to find out when  
8 the subdivisions of property on Roberts Island separated  
9 the current Dunkel parcel from the direct physical  
10 connection to Middle River.

11 MR. O'LAUGHLIN: One of the things I understand  
12 from your testimony is that you looked to the deeds from  
13 1911 as intent, that there was an intent to maintain the  
14 riparian nature of the parcel; is that correct? Or  
15 deliver it water?

16 MR. BLAKE: Yeah, I think what we talked about  
17 with Mr. Rubin was the transfer of what became the  
18 current Dunkel parcel took place after the 1911  
19 agreement to furnish water.

20 MR. O'LAUGHLIN: Now would your testimony be  
21 different if the transfer had occurred before the 1911  
22 agreement?

23 MR. BLAKE: I don't know that it would be  
24 different because I think there was still some other  
25 evidence, especially maps, that indicated that they were

1 serving water to the lands that included the parcel.

2 I think the fact that the transfer occurred  
3 after was just kind of another drop in the bucket, you  
4 know, another piece of evidence to me that they  
5 obviously wanted that parcel to maintain the ability to  
6 get water.

7 MR. O'LAUGHLIN: Now you have been very good  
8 about using a terminology that I find interesting: The  
9 ability to receive water.

10 So now my next question to you is: What water?  
11 Whose water was being delivered to Dunkels' property,  
12 and under what right?

13 MR. BLAKE: I don't know if I can answer that  
14 question.

15 What I can tell you is that, based on the  
16 evidence I reviewed, the Dunkel parcel was either  
17 directly connected to Middle River, surface connection,  
18 or adjacent to a slough that was directly connected to  
19 Middle River.

20 And as far as whose right that was to the water  
21 or whose water it was flowing through the slough, I  
22 don't think I'm qualified to make statements about that.

23 MR. O'LAUGHLIN: But would your statement be  
24 though that the nature of the right that's being held by  
25 Dunkel is a riparian right, correct?

1           MR. BLAKE: I don't think I'm making that  
2 assertion, Mr. O'Laughlin.

3           MR. O'LAUGHLIN: Okay. So you're not making an  
4 assertion that it's either riparian or pre-1914 or  
5 post-14 or is a right held by somebody else; is that  
6 correct?

7           MR. BLAKE: I was asked to present evidence  
8 that could be used to form a conclusion on the basis of  
9 a riparian right.

10          MR. O'LAUGHLIN: In regards to the 1911  
11 agreement, could it be that the importance of doing the  
12 transfer afterwards was to maintain the easement or  
13 right of way for the canal and not to deliver water to  
14 the parcel?

15          MR. HERRICK: I would just ask for a  
16 clarification.

17                 The agreement that Mr. Blake has testified  
18 about is the agreement to furnish water. There are  
19 separate agreements dealing with variation easements and  
20 servitudes, but I would think the question would need  
21 more clarification given that substantial factual issue.

22          MR. O'LAUGHLIN: Sure.

23                 Is it your understanding that the agreement to  
24 deliver water, the 1911 agreement, is basically at the  
25 same point in time as the 1911 agreement to provide

1 easements and rights of way to various lands within  
2 Woods Irrigation Company?

3 MR. BLAKE: I don't know that that's material.  
4 Even if the parcel had been created before, it would  
5 have been very easy for the parties when they created  
6 that deed that transferred that parcel to reserve the  
7 right for the canal right of way.

8 MR. O'LAUGHLIN: What map do you want to look  
9 at real quick. Is it the 1907 map that you used? Is  
10 that the one with --

11 MR. BLAKE: I used two, the 1907 or the 1914.

12 MR. O'LAUGHLIN: Sure. Let's put up the 1907  
13 map real quick.

14 MR. BLAKE: Okay. I believe that's J -- is it  
15 4J? It's a Woods exhibit, Mr. Lindsay. Hang on a  
16 second. I'll find it.

17 6J, Mr. Lindsay. I apologize. WIC 6J.

18 I think it was in your list, Mr. Lindsay, that  
19 you just had up on the web page.

20 MR. O'LAUGHLIN: So is it my understanding  
21 based on your testimony then that any lands that are  
22 adjacent or touching the distribution system within  
23 Woods Irrigation Company would maintain a riparian right  
24 if in fact those transfers occurred after 1911?

25 MR. BLAKE: I don't know that I can be that

1 bold. That certainly is something that an attorney  
2 could argue.

3 I can say that I believe that is the case for  
4 the Dunkel parcel because I've looked at all the  
5 evidence related to the Dunkel parcel.

6 You know, the fact that the Dunkel parcel is  
7 included in the lands shown on this map and that are, in  
8 my opinion as a person that interprets maps, obviously  
9 being irrigated, I believe that's evidence that could  
10 be -- I believe that could be evidence that there was an  
11 intent to preserve a riparian right.

12 MR. O'LAUGHLIN: Okay. You've been present  
13 previously when people -- Mr. Grunsky has testified that  
14 since 1909 the entire service area of Woods Irrigation  
15 District has been irrigated.

16 If that statement is correct, would that  
17 support your assertion, then, that any lands along these  
18 canals would have retained their riparian rights after  
19 1911, even if they'd been severed.

20 MS. GILLICK: Object --

21 MR. HERRICK: Mr. Blake, you can -- I'm  
22 sorry -- you can certainly answer that, but I don't  
23 believe you were here when Mr. Grunsky testified.

24 MS. GILLICK: Objection. I think that  
25 Mr. O'Laughlin has mischaracterized the testimony.

1           He has not asserted that any lands along any  
2 canal within Woods. I believe his response to his last  
3 question was as to the Dunkel property I can agree with  
4 you. But he did not say any lands within the entire  
5 Woods service. So I think it's misstating testimony.

6           MR. O'LAUGHLIN: You missed the point. The  
7 point was -- and I get it. I don't know if you were  
8 present or not when Mr. Grunsky testified. Were you  
9 present?

10          MR. BLAKE: I was not present.

11          MR. O'LAUGHLIN: Okay. That's easy. Thank  
12 you.

13          Okay. Mr. Nomellini, earlier there was a  
14 discussion that the Dunkel property received water from  
15 Woods Irrigation Company; is that correct?

16          MR. NOMELLINI: I believe it received water  
17 from the Woods Irrigation Company previously and does  
18 today.

19          MR. O'LAUGHLIN: Okay. So now let's go back in  
20 time, and we're in 1909. And what water is being  
21 provided to the Dunkel property? Is it a riparian water  
22 or is it a pre-1914 water right?

23          MR. NOMELLINI: I'd say both.

24          MR. O'LAUGHLIN: Why don't you explain to me  
25 how you believe a parcel prior to 1914 can have both a

1 riparian right and a pre-1914 right?

2 MR. NOMESELLINI: I believe that's what the law  
3 is. I don't think there is anything inconsistent about  
4 a parcel having both riparian and pre-1914 rights  
5 because you meet the test for both.

6 Riparian would be maintaining a connection to  
7 the river that is recognizable in a situation where  
8 there is no indication of intent to withhold the  
9 riparian right from that parcel.

10 So once it was connected to the river, I think  
11 we look beyond it without even arguing about the  
12 language of the deed to see what intent was reflected,  
13 and I think it's the intent of the grantor, as to  
14 whether or not there is a reservation of the riparian  
15 right.

16 And then with regard to the pre-1914 right, I  
17 think you have to have a diversion prior to 1914 in  
18 order to establish that right.

19 MR. O'LAUGHLIN: But if you were riparian prior  
20 to 1914 diverting water on your property, you would be  
21 diverting under your riparian right. It's just not the  
22 time and place of the date in which you exercise the  
23 right that makes it either riparian or pre-1914, does  
24 it?

25 MR. NOMESELLINI: If you're riparian, you can

1 argue there's no necessity to have a pre-1914; but  
2 there's nothing that I know of in the law that precludes  
3 you from having both.

4 MR. O'LAUGHLIN: Okay. Prior to 1914 -- just a  
5 couple questions. I'm almost done. I know.

6 In 1914, what water was foreign water in the  
7 San Joaquin River basin system at Middle River?

8 MR. NOMELLINI: Maybe I didn't hear you right.  
9 What water was what?

10 MR. O'LAUGHLIN: Foreign water.

11 MR. NOMELLINI: Foreign water?

12 MR. O'LAUGHLIN: Yes.

13 MR. NOMELLINI: In the San Joaquin basin in  
14 1914?

15 MR. O'LAUGHLIN: Yes.

16 MR. NOMELLINI: The San Joaquin -- well,  
17 foreign water --

18 MR. O'LAUGHLIN: Yeah, foreign water.

19 MR. NOMELLINI: -- in 1914. I don't know of  
20 any foreign water in 1914.

21 MR. O'LAUGHLIN: Okay. What is your  
22 understanding of the amount of water that had been  
23 stored pre-1914 in the San Joaquin River system that was  
24 subject to appropriation in the basin prior to 1914,  
25 stored water?

1 MR. NOMELLINI: Stored water?

2 MR. O'LAUGHLIN: Yeah.

3 MR. NOMELLINI: I think there was some, but I  
4 don't know what quantity.

5 MR. O'LAUGHLIN: One more question. Just one  
6 second. I'm almost done. Thank you.

7 Thank you for your time. I have no further  
8 questions.

9 CO-HEARING OFFICER BAGGETT: I guess one more,  
10 Ms. Gillick?

11 --o0o--

12 CROSS-EXAMINATION BY MS. GILLICK

13 FOR CENTRAL DELTA WATER AGENCY

14 SOUTH DELTA WATER AGENCY

15 - and -

16 SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD  
17 CONTROL & WATER CONSERVATION DISTRICT

18 --o0o--

19 MS. GILLICK: DeeAnne Gillick on behalf of the  
20 County parties as well as South Delta Water Agency and  
21 Central Delta Water Agency.

22 Mr. Blake, in your testimony on paragraph 27,  
23 you make a reference to a prior statement by Mr. Wee.

24 And the quotation states:

25 Was the only parcel that remained

1 riparian through 1911 via Middle River.

2 Are you familiar and you see that?

3 MR. BLAKE: Yes.

4 MS. GILLICK: Your later statement directly  
5 following that in your testimony states:

6 This later testimony by Steve Wee is  
7 correct.

8 I'd like to ask you a few questions regarding  
9 that.

10 MR. BLAKE: Certainly.

11 MS. GILLICK: When you state that the testimony  
12 from Mr. Wee is correct, aren't you referring to the  
13 fact that the property in which the Dunkel property is  
14 located remained riparian?

15 MR. BLAKE: I'm glad you brought this up  
16 because I want to make sure there's no confusion here.

17 The statement that is correct in my opinion is  
18 that the 700-acre parcel was riparian.

19 What I would contest is Mr. Wee's statement  
20 that the other lands were not riparian.

21 MS. GILLICK: So you contest or question the  
22 word "only" parcel?

23 MR. BLAKE: That's correct. I don't believe  
24 that's -- the word "only" is appropriate, based on my  
25 research.

1 MS. GILLICK: And I believe it's your opinion  
2 there were other parcels with the Woods Irrigation  
3 Company service area that were riparian in 1911; is that  
4 correct?

5 MR. BLAKE: Certainly. And I could have chosen  
6 better wording for that paragraph.

7 MS. GILLICK: Okay. I next would like to do a  
8 couple clarifications on deeds.

9 I noticed in your direct testimony you did  
10 clarify some dates on the deeds, but I'd like to further  
11 refer to Exhibit 3C in your testimony.

12 And I believe in your testimony you indicate  
13 the date of that deed is September 11, 1978 (sic); and  
14 if we could go to the map that you prepared associated  
15 with this, I believe the date on the map is March 15,  
16 1877.

17 MR. BLAKE: That's correct. I thought I  
18 pointed that out on direct, and perhaps I missed it, but  
19 the date on the exhibit, the map, is the correct date.

20 MS. GILLICK: Then if we could also turn to the  
21 next Exhibit 3D, again your testimony indicates the date  
22 of June 8, 1891, but if we look at the last page of the  
23 map it states September 28, 1891. If you concur with  
24 me, I believe the correct date from the deed is in fact  
25 September 8, 1891.

1 MR. BLAKE: I believe --

2 MS. GILLICK: September 8th -- let's do this  
3 correctly.

4 The correct date from the deed is June 8, 1891.

5 MR. BLAKE: Yeah. Let me look at it real  
6 quick. Yeah. That's correct. June is the correct  
7 date.

8 Just let me clarify the record. The recording  
9 date of that document was June 17, 1891. And that's  
10 directly from the last page of the deed, so I apologize  
11 about the confusion.

12 MS. GILLICK: Now I'd like to turn to -- I  
13 believe your transfer number seven is the deed which you  
14 say separated the Dunkel property from physical  
15 connection from Middle River; is that correct?

16 MR. BLAKE: We have to be careful about  
17 physical, but from a direct surface connection. In  
18 other words, the parcel no longer touched Middle River  
19 directly.

20 MS. GILLICK: And that exhibit is Exhibit 3G.  
21 Could we look at Exhibit 3G, please.

22 Now isn't there evidence in the actual deeds  
23 that indicates that this property was to continue to  
24 receive water from Middle River? And if I could point  
25 you to the specific reference, the last typed-in

1 paragraph, which states:

2 Also subject to the contract to furnish  
3 water dated September 29, 1911, and  
4 recorded.

5 Do you see that language?

6 MR. BLAKE: I do see that statement. That  
7 would indicate to me that this parcel was subject to and  
8 part of that agreement to furnish water.

9 MS. GILLICK: And what is that September 29,  
10 1937 agreement? Isn't that the agreement with Woods  
11 Irrigation Company to furnish water to these properties?

12 MR. BLAKE: Yeah, that's -- I believe it's the  
13 November or September 29th agreement between Woods  
14 Irrigation Company and -- get the names right -- Jessie  
15 Wilhoit and Mary Douglass to furnish water.

16 MS. GILLICK: And you are familiar with that  
17 agreement?

18 MR. BLAKE: I am.

19 MS. GILLICK: And does that agreement impose an  
20 obligation for Woods Irrigation Company to deliver water  
21 to this property?

22 MR. BLAKE: I would say yes, it does.

23 MS. GILLICK: Okay.

24 I have no further questions.

25 CO-HEARING OFFICER BAGGETT: That's all the

1 parties. Do you have any redirect?

2 MR. HERRICK: Just very little, please.

3 CO-HEARING OFFICER BAGGETT: Continue.

4 --o0o--

5 REDIRECT EXAMINATION BY MR. HERRICK

6 --o0o--

7 MR. HERRICK: Could we put up the map from 3G  
8 again, please.

9 Mr. Blake, do you recall the questions from  
10 Mr. O'Laughlin regarding the article by -- the article  
11 that referenced the installation of a head gate and  
12 construction of a canal? Do you recall those questions?

13 MR. BLAKE: I do.

14 MR. HERRICK: Now, as you look at this map, and  
15 you recall the various documents you've looked at, would  
16 you say that the straight line coming off of the  
17 diversion point running in a north/northeast direction  
18 would likely be the canal being constructed rather than  
19 the curvy line you've identified as an old slough?

20 MR. BLAKE: I think that's a fair statement,  
21 yeah.

22 MR. HERRICK: Now whether or not the reference  
23 to a canal being built in that article is either that  
24 straight line or curvy line, does that affect any of  
25 your conclusions?

1           MR. BLAKE: No, it doesn't. The -- to me, the  
2 facts demonstrate that the parcel has always been  
3 adjacent to that slough that runs in a northeasterly  
4 direction from Middle River.

5           MR. HERRICK: Now, Mr. Blake, there are a  
6 couple possibilities. One of them is that the slough  
7 you referred to was dammed off somewhere around 1875 and  
8 1876. And the other one is that when it was dammed off  
9 it had a sluice gate put in it.

10           And the other one is that it was dammed off and  
11 then a head gate was placed in somewhere around 1898.  
12 Would you agree those are generally the possibilities?

13           MR. BLAKE: I would agree.

14           MR. HERRICK: And regardless of those  
15 possibilities, is it your testimony that the Dunkel  
16 parcel was connected to a channel which connected to  
17 Middle River before it was severed from the larger piece  
18 which abutted Middle River?

19           MR. BLAKE: That's correct.

20           MR. HERRICK: And so no matter what the  
21 possibilities -- excuse me -- no matter what the actual  
22 situation was from those three possibilities I gave you,  
23 this specific piece of property was abutting a channel  
24 connected to Middle River before it was severed from the  
25 larger parcel; is that correct?

1 MR. BLAKE: That's correct.

2 MR. HERRICK: So that parcel in your opinion  
3 had the ability to get water from Middle River before,  
4 at the time of, and subsequent to its separation from a  
5 physical surface connection with Middle River; is that  
6 correct?

7 MR. BLAKE: That's correct.

8 MR. HERRICK: Mr. Nomellini, you were asked one  
9 or two questions with regard to foreign waters or stored  
10 water in the San Joaquin River system prior to 1914. Do  
11 you recall that?

12 MR. NOME LLINI: Yes.

13 MR. HERRICK: Mr. Nomellini, let me give you a  
14 hypothetical. If the only water coming down the San  
15 Joaquin River is foreign water, and we dammed that off  
16 so we don't let it go into the Delta, is there water in  
17 Middle River?

18 MR. NOME LLINI: Sure.

19 MR. HERRICK: If we shut off all the  
20 tributaries to the San Joaquin Delta, the Sacramento-San  
21 Joaquin Delta, is there water in Middle River?

22 MR. NOME LLINI: Yes.

23 MR. HERRICK: If we did shut those off, the  
24 water quality would slowly deteriorate; is that correct?

25 MR. NOME LLINI: That's correct.

1 MR. HERRICK: And that takes time for the salt  
2 water intrusion through tidal action to work its way  
3 eastward, correct?

4 MR. NOMELLINI: Correct.

5 MR. HERRICK: But under any scenario that you  
6 know of, is there ever a time, absent outside forces at  
7 work such as export pumps, is there ever a time when  
8 there's not water in Middle River?

9 MR. NOMELLINI: Not to my knowledge, not during  
10 the period we're talking about.

11 MR. HERRICK: So if you're doing an analysis of  
12 whether or not a parcel has the ability or the right to  
13 get water from a channel in the Delta, is it relevant  
14 how much or what water is coming down the San Joaquin  
15 River?

16 MR. NOMELLINI: I don't believe so.

17 MR. HERRICK: I have no further questions.

18 CO-HEARING OFFICER BAGGETT: Any recross?

19 Mr. Rubin? Mr. O'Laughlin? Prosecution?

20 Hearing none.

21 MR. HERRICK: I would move --

22 CO-HEARING OFFICER BAGGETT: I should ask  
23 staff.

24 MR. HERRICK: I'm sorry.

25 CO-HEARING OFFICER BAGGETT: All right.

1 MR. HERRICK: I would then move that the  
2 exhibits presented today, which are Exhibit 3 and all of  
3 the attachments referenced thereto, Exhibit 4,  
4 Exhibit 5, and Exhibit 9 and all the attachments thereto  
5 be moved into evidence.

6 CO-HEARING OFFICER BAGGETT: Any objection?  
7 Hearing none, they're admitted. Thank you.

8 (Whereupon the above-mentioned exhibits  
9 were admitted in evidence.)

10 MR. HERRICK: Thank you.

11 CO-HEARING OFFICER BAGGETT: Let's take a  
12 ten-minute break, come back and set up with Modesto  
13 Irrigation District.

14 (Recess)

15 CO-HEARING OFFICER BAGGETT: Let's go back on  
16 the record and hear the one-minute direct.

17 --o0o--

18 STEPHEN R. WEE

19 Called by MODESTO IRRIGATION DISTRICT

20 DIRECT EXAMINATION BY MR. O'LAUGHLIN

21 --o0o--

22 MR. O'LAUGHLIN: Tim O'Laughlin for Modesto  
23 Irrigation District.

24 Mr. Wee, were you present and did you take the  
25 oath?

1 MR. WEE: I did.

2 MR. O'LAUGHLIN: And we have a numbering  
3 problem, correct? So I think what we did is we  
4 renumbered Mr. Wee's testimony as MSS Exhibit 7 because  
5 we had two 3s. Sorry about that.

6 Mr. Wee, is that a true and correct copy of  
7 your testimony?

8 MR. WEE: Yes, it is.

9 MR. O'LAUGHLIN: Okay. And in your original  
10 testimony, you made an error; is that correct?

11 MR. WEE: That's correct.

12 MR. O'LAUGHLIN: Okay. And you caught that  
13 error, and you rectified that error; is that correct?

14 MR. WEE: That's correct.

15 MR. O'LAUGHLIN: Okay. And so you would agree  
16 with the Dunkel parties that the severance from the  
17 physical connection to Middle River occurred on  
18 November 29, 1911; is that correct?

19 MR. WEE: Yes, that's correct.

20 MR. O'LAUGHLIN: Thank you.

21 That's our direct.

22 CO-HEARING OFFICER BAGGETT: This is your  
23 direct.

24 MR. O'LAUGHLIN: Mm-hmm.

25 MS. GILLICK: It's different than what was

1 provided previously, three days ago?

2 MR. O'LAUGHLIN: No. It's the same testimony.  
3 It's just renumbered MSS Exhibit 7. We had  
4 originally --

5 CO-HEARING OFFICER BAGGETT: To correct a  
6 numbering problem.

7 MS. GILLICK: Thank you.

8 MR. O'LAUGHLIN: We had a numbering problem.  
9 It was MSS-3. We already had two 3s. Sorry about that.

10 CO-HEARING OFFICER BAGGETT: Okay. Thank you.  
11 So cross-examination?

12 MR. ROSE: We have none.

13 CO-HEARING OFFICER BAGGETT: Mr. Herrick?

14 --o0o--

15 CROSS-EXAMINATION BY MR. HERRICK

16 FOR MARK and VALLA DUNKEL

17 --o0o--

18 MR. HERRICK: John Herrick for the Dunkels.

19 Mr. Wee, as I read your testimony, now MSS-7,  
20 you indicated that the error from the previous testimony  
21 in this matter was due to a confusion of mapping a  
22 certificate of purchase; is that correct?

23 MR. WEE: That is correct.

24 MR. HERRICK: Could you explain how the  
25 incorrect mapping of the certificate of purchase

1 affected your reading of the deed that alleged the  
2 severance -- that was allegedly the severance?

3 MR. WEE: Sure. The certificate of purchase,  
4 as it was depicted on the map that I originally  
5 submitted which is now Exhibit 7B, was set about a mile  
6 too far to the south. It should have been set along the  
7 township line between T1 North and T1 South.

8 That effectively -- that mistake effectively  
9 placed the Dunkel parcel erroneously in certificate of  
10 purchase 2864 rather than 3321 which is the certificate  
11 of purchase it's located in.

12 When the property -- when the Woods brothers  
13 property was divided in 1909, it was divided along the  
14 main canal. And if you follow the logic of the parcel  
15 being in CP 2864, it would have been severed from the  
16 river by the change in the boundary.

17 But because it's in CP 3321, it remains  
18 riparian to Middle River and therefore wasn't severed  
19 until 1911.

20 MR. HERRICK: I need to explore that because  
21 I'm not following your reasoning there.

22 I believe in other questioning you've  
23 postulated that a certificate of purchase could result  
24 in the loss of a riparian right because it granted lands  
25 that weren't connected to a waterway; is that correct?

1 Is that your -- generally your position you've taken?

2 MR. WEE: Yes.

3 MR. HERRICK: So in your original testimony,  
4 you didn't allege that the certificate of purchase  
5 caused the severance; you alleged that the deed in 1909  
6 caused the severance.

7 So again, I'm not sure how the changing line on  
8 the certificate of purchase, which were back in 1869,  
9 how that may have affected your decision that a 1909  
10 deed constituted some sort of severance. Could you  
11 explain that.

12 MR. WEE: It has to do with which certificate  
13 of purchase begins the chain of title for the property.  
14 And depending on where -- which certificate of purchase  
15 it's in, the dividing of the property in 1909 on that  
16 north/south trending line along Middle River, if the  
17 certificate of purchase is in 2864, as I had depicted it  
18 before, then it is severed because 2864 -- it no longer  
19 has a riparian connection to Middle River with respect  
20 to the Wilhoit Douglass property.

21 But if it's in CP 3321, then it retains the  
22 riparian connection by virtue of the properties to the  
23 south along Middle River that are within CP 3321.

24 MR. HERRICK: So what you're saying, if you  
25 start off in the wrong chain of title because of the

1 certificate of purchase line error then you might come  
2 up with a different timing of severance; is that  
3 correct?

4 MR. WEE: Yes, or different -- completely  
5 different analysis, not just a change of timing. In  
6 this case, that is the result.

7 MR. HERRICK: Okay. But in your testimony for  
8 this hearing, initially given, your Exhibit 1G  
9 apparently has the correct chain of title because you  
10 show the correct outline, or a corner of it, of the  
11 Wilhoit Douglass tract touching Middle River.

12 So I don't -- again, I don't understand how the  
13 error manifests itself if you indeed actually had the  
14 correct chain of title.

15 Do you have your Exhibit 1G?

16 MR. WEE: No, I don't.

17 MR. HERRICK: Let me hand you it. Perhaps we  
18 could bring that up on the ... and while you're looking  
19 at that, Mr. Wee, let me just describe Exhibit 1G from  
20 MSS-1 in this hearing, it actually has the corner of the  
21 Wilhoit Douglass tract outlined -- I believe; you can  
22 correct me if I'm wrong -- and that corner of the tract  
23 touches Middle River, and you've got the Dunkel property  
24 located within that, and that's your exhibit indicating  
25 a severance from Middle River.

1           Now as I understood your statement, if you're  
2 on the wrong chain of title, that would result in  
3 different conclusions about timing of severance.

4           But does this map in your testimony not  
5 indicate you were on the correct chain of title because  
6 you actually mapped the correct corner of the Wilhoit  
7 Douglass tract touching Middle River?

8           MR. WEE: The parcel as it's shown on that map,  
9 if it were in 2864 -- which is an error -- then it would  
10 have been severed.

11           But what I'm saying now is that it is not  
12 severed. The CP 3321 extended up -- all the way up to  
13 the top of that section line at the township line which  
14 then makes it continue to be connected to the riparian  
15 parcel that is 3321.

16           MR. HERRICK: I understand your answer, Mr.  
17 Wee, but on 1G here you didn't map a transfer separating  
18 a parcel from Middle River. So again, I'm trying to  
19 understand the basis of the error. It's my reading of  
20 your testimony that the --

21           MR. O'LAUGHLIN: I'm going to -- go ahead; I'm  
22 sorry.

23           MR. HERRICK: From my reading of your  
24 testimony, it's the incorrect certificate of purchase  
25 mapping rather than the deed that you mapped and

1 presented; is that correct?

2 MR. O'LAUGHLIN: Wait. Yes.

3 But I'm going to object. This whole line of  
4 questions is irrelevant. There's no dispute between  
5 what Mr. Wee is saying or anyone else that the  
6 severance, the physical severance, occurs in 1911.

7 So whether he made an error and the basis of  
8 the error, who cares? That's irrelevant.

9 I mean if it goes to something else that is a  
10 foundational issue here, I'd like to hear it, but it  
11 doesn't. There's no dispute that it was 1911.

12 MR. HERRICK: It's relevant in the credibility  
13 of the witness. The question that --

14 MR. O'LAUGHLIN: He's agreed with your witness.  
15 How do you say he's not credible?

16 CO-HEARING OFFICER BAGGETT: Wait, Mr.  
17 O'Laughlin.

18 Mr. Herrick?

19 MR. HERRICK: It goes to the credibility of the  
20 witness. I'm trying to explore why a transaction in  
21 1869 is alleged to have resulted in an incorrect  
22 conclusion on a deed dated 1809.

23 And I think I'm able to explore that because so  
24 far the answers, I believe -- I don't see being  
25 consistent with the testimony previously again.

1 MR. O'LAUGHLIN: Can I respond? Sorry.

2 We put into evidence Mr. Wee made a mistake.  
3 We explained the mistake. Mr. Wee's testimony agrees  
4 with their expert testimony that the actual physical  
5 severance occurs on November 29, 1911.

6 Actually, it's redundant. I don't even know  
7 why I put this testimony in. It's redundant.

8 But we did want to show the mistake to let you  
9 know we had made a mistake, that there's no dispute,  
10 that we agree that the severance, the actual physical  
11 severance, occurs in 1911.

12 So what the purpose of that has to do with  
13 anything -- he's impeaching his own credibility that in  
14 fact 1911 is in fact the date of the severance.

15 CO-HEARING OFFICER BAGGETT: You made your  
16 point.

17 Mr. Herrick, do you have any final?

18 MR. HERRICK: Well, I would just say that  
19 objection doesn't make any sense.

20 I'm not impeaching the conclusion of severance.  
21 I'm trying to explore Mr. Wee's less-than-satisfactory  
22 explanation for the error. That's what I'm trying to  
23 explore.

24 And the next line of questioning will follow on  
25 in that because he says he didn't discover it while he

1 was doing his Woods hearings testimony, even though that  
2 Woods hearing testimony says that this land is riparian  
3 still. And so I'm trying to explore the  
4 inconsistencies.

5 MR. O'LAUGHLIN: Yeah, but Woods is Woods, and  
6 Woods is done. So that's irrelevant for this  
7 proceeding.

8 And he's already explained it. It's very  
9 simple. The boundary shifted a mile north to mile  
10 south. They mapped it wrong. There's nothing else to  
11 explore.

12 I don't -- he's already asked and answered the  
13 question three times.

14 MR. HERRICK: One more thing Mr. Chairman.

15 CO-HEARING OFFICER BAGGETT: Can you just  
16 continue, and just be brief with your cross.

17 MR. HERRICK: I will.

18 CO-HEARING OFFICER BAGGETT: We'll overrule the  
19 objection. Because a lot of this is starting to get  
20 repetitive. So if you could just cut to the point, that  
21 would be appreciated.

22 MR. HERRICK: Mr. Wee, did you read the deed  
23 that you mapped on the Exhibit 1G I provided to you for  
24 purposes of mapping it?

25 MR. WEE: Yes.

1           MR. HERRICK:  And therefore, did you note the  
2 language in that deed that describes the land going to  
3 Middle River and then running along it for some  
4 distance?

5           MR. WEE:  Yes.  But that is not -- I think  
6 you're misunderstanding my analysis completely.

7           The severance -- I mean my conclusion that it  
8 was severed is that the portion of the property that was  
9 cut off from the river in 1909 lied within CP 2864 and  
10 that the severed parcel was in that certificate of  
11 purchase, and it lost its connection to Middle River.

12           And I think if you want to turn to the  
13 sequencing maps, Exhibit 8A through 8E, I think it's  
14 very clearly shown.

15           In 8A, we've adjusted the line to the north one  
16 mile so that you can see that now the Dunkel property is  
17 in CP 3321.  It gained its riparian status by virtue of  
18 being within that parcel.

19           If you go to B, you can see that that parcel  
20 was packaged together with other properties in 1877 to  
21 create a much larger parcel, but the riparian connection  
22 that is derived from the Dunkel parcel is related to its  
23 status as part of CP 3321.

24           If you go to 1891, you'll see the new parcel  
25 which shows the area within 3321 that remains riparian.

1           If you go to D, you see in 1909 the area within  
2 CP 3321 that remains riparian.

3           Then you have a severance in 1911.

4           That is my analysis, and I think it's very  
5 clear.

6           MR. HERRICK: Mr. Wee, you stated you didn't  
7 think I understood the presentation, so let me explore  
8 that.

9           If the certificate of purchase as originally  
10 granted, if that's the right word, is abutting a river,  
11 do you assert that any of the lands within that  
12 certificate of purchase have been severed from the  
13 river?

14           MR. WEE: If you have a single certificate of  
15 purchase that abuts the river, then the land within the  
16 certificate of purchase would be riparian to that river.

17           MR. HERRICK: Now does the outline or the shape  
18 or the configuration of the original certificate of  
19 purchase have anything to do with subsequent deeds that  
20 may sever the property?

21           In other words, do you have to reflect back to  
22 the certificate of purchase to see whether or not a deed  
23 accomplishes a severance?

24           MR. WEE: Yes.

25           MR. HERRICK: Explain that please.

1 MR. WEE: Well --

2 MR. HERRICK: If the severance is accomplished  
3 by the deed, and it wasn't severed by the certificate of  
4 purchase, what's the relevancy of the certificate of  
5 purchase?

6 MR. WEE: Because the original -- the  
7 foundational document in the chain of title is a  
8 certificate of purchase.

9 Like any other parcel, a certificate of  
10 purchase can be chopped up into smaller subdivisions.  
11 Some of those subdivisions would remain riparian and  
12 some wouldn't.

13 And in this case, the analysis is such that  
14 in -- you go through the various deeds, and that  
15 occurred in 1911.

16 MR. HERRICK: So it has to do with the deed  
17 since the certificate of purchase did not result in a  
18 severance?

19 MR. WEE: The --

20 MR. O'LAUGHLIN: I'm sorry. I'm going to  
21 object. This has been asked and answered seven  
22 different ways, seven different times.

23 I don't get how much more we're going to beat  
24 this thing to death. It's been asked and answered.

25 The certificate of purchase was a mistake. The

1 certificate of purchase doesn't sever anything. The  
2 only problem was they moved the line a mile south rather  
3 than being north. Great. We put it in the wrong CP.  
4 We get it. We've explained that and --

5 CO-HEARING OFFICER BAGGETT: Okay.

6 MR. HERRICK: The wrong line on the certificate  
7 of purchase is irrelevant to the deed accomplishing the  
8 severance later in time.

9 And we can say it a thousand times that the  
10 line was wrong for the certificate of purchase, but it's  
11 the later transfer, the deed, that accomplishes a  
12 severance. Thus, the wrongful mapping of a line of  
13 certificate of purchase, which didn't accomplish the  
14 severance, is irrelevant and is not an excuse for the  
15 statement that the deed caused the severance or not.

16 And that's a perfectly legitimate line of  
17 questioning given that the answers do not respond to the  
18 question.

19 Now with that said, I will move on.

20 CO-HEARING OFFICER BAGGETT: Okay. Move on.

21 Thank you.

22 MR. HERRICK: Mr. Wee, you state in your  
23 testimony, which is now MSS-7, that:

24 This error was not discovered prior to my  
25 testimony in the Dunkel and Woods

1 hearing.

2 Is that correct?

3 MR. WEE: That's correct.

4 MR. HERRICK: Now, in the Woods hearing, you  
5 presented evidence evaluating Mr. Landon Blake's  
6 testimony. Do you recall that?

7 MR. WEE: Yes.

8 MR. HERRICK: And in that testimony you recall  
9 focusing on one, I'll say parcel, one area of land  
10 approximately 710 acres which you concluded maintained a  
11 riparian connection as of 1911; do you recall that?

12 MR. WEE: Yes.

13 MR. HERRICK: And that one parcel that  
14 maintained the riparian connection included the Dunkel  
15 parcel, did it not?

16 MR. WEE: In fact it does, yes.

17 MR. HERRICK: Okay. So when you gave that  
18 testimony, you were aware of the error in your previous  
19 Dunkel testimony then; is that correct?

20 MR. WEE: No.

21 MR. HERRICK: Why is that?

22 MR. WEE: I didn't focus at the time that  
23 Dunkel was within that area.

24 MR. HERRICK: So is it your testimony that the  
25 first time you caught your error was, what, when you

1 reviewed the motion by the Dunkel parties to reopen this  
2 hearing?

3 MR. WEE: That's correct.

4 MR. HERRICK: Okay. Mr. Wee, in your opinion,  
5 the fact that the Dunkel property was not separated from  
6 a surface connection from Middle River until November of  
7 1911 in conjunction with the September 29, 1911 to  
8 furnish water, does that lead you to conclude that the  
9 Dunkel property has preserved a riparian right?

10 MR. WEE: Not necessarily.

11 MR. HERRICK: Why not?

12 MR. WEE: Well, there's a -- I mean there is a  
13 contract to provide water. Whether it's a pre-1914  
14 right they're relying on or riparian right, I don't see  
15 anything in the document that specifies what the, you  
16 know, basis is.

17 I think that it's fair to say that there was an  
18 intent to serve lands as they could be served within the  
19 Woods Irrigation District perhaps, but the basis of that  
20 right, I -- I don't --

21 MR. HERRICK: So let me just -- in your  
22 original testimony for the Dunkel matter, you state that  
23 your historical research investigations covering a wide  
24 range of topics including services as an expert  
25 historian in legal cases involving pre-1914

1 appropriate water rights, riparian water rights,  
2 historic land navigation, and other.

3 In your opinion, the preservation of the  
4 ability to get water through an agreement before the  
5 land was severed from the property does not indicate to  
6 you that a riparian right was preserved? Is that your  
7 testimony here today?

8 MR. WEE: No. I'm saying it could. It could.

9 But I'm what I'm saying is that -- I mean we  
10 have these 1911 agreements. We -- obviously there was  
11 an intention to supply water to the lands if they could  
12 get them the water.

13 We know that not all the lands were supplied  
14 with water. So, you know, the -- this is -- there's an  
15 irrigating company that is in place that is maintaining  
16 canals, and there's a contract to furnish water.

17 I think all of that goes towards the idea that  
18 there was going to be an intent to try to irrigate.

19 But I don't know that this land was ever -- I  
20 don't have any evidence it was irrigated. I don't have  
21 any evidence that they delivered water to this parcel.

22 MR. HERRICK: Mr. Wee, in your expert opinion,  
23 is the actual irrigation of water onto the land required  
24 to draw a conclusion about the preservation of a  
25 riparian right to this 1911 agreement?

1           MR. WEE: No. A riparian right could be -- can  
2 be -- if you have a riparian right, it could be  
3 exercised at a later date, if that's what you're asking  
4 me.

5           MR. HERRICK: Just so we're clear, because your  
6 answers before have been "not necessarily". I'm asking  
7 you your conclusion, specifically, with regard to  
8 whether or not the riparian right was preserved for the  
9 Dunkel property.

10          MR. O'LAUGHLIN: I object. It's been asked and  
11 answered. He said it could.

12          MR. HERRICK: I clarified my question. His  
13 prior answer --

14          CO-HEARING OFFICER BAGGETT: Answer.

15          MR. HERRICK: Do you have -- what is your  
16 conclusion --

17          CO-HEARING OFFICER BAGGETT: Overruled.

18          MR. HERRICK: -- with regard to the  
19 preservation of a riparian right on this land?

20          Mr. O'Laughlin, once again, you just told him  
21 that he didn't have one, prompting this witness.

22          MR. O'LAUGHLIN: No.

23          MR. HERRICK: Now this is a regular process.

24          MR. O'LAUGHLIN: My problem is this,  
25 Mr. Hearing Officer, is these questions have been asked

1 and answered.

2 He responded three times already that given the  
3 nature of what occurred out there he couldn't tell  
4 whether it was a riparian water being delivered, a  
5 pre-1914 water, or if in fact any water had ever been  
6 delivered.

7 MR. HERRICK: The objection was already made  
8 and was ruled on.

9 CO-HEARING OFFICER BAGGETT: Overruled. Ask  
10 one -- rephrase your question. You'll have one more  
11 shot at it.

12 And the witness, answer to the best of your  
13 ability.

14 MR. HERRICK: Mr. Wee, regardless of anyone's  
15 alleged pre-1914 rights, in your opinion did the Dunkel  
16 property preserve a riparian right by being subject to  
17 the September 29, 1911 agreement to furnish water which  
18 was recorded and executed prior to the land's physical  
19 severance from Middle River?

20 MR. WEE: And I would have to say that I don't  
21 know.

22 MR. HERRICK: Okay.

23 Thank you very much.

24 CO-HEARING OFFICER BAGGETT: Thank you.

25 Ms. Gillick, do you have any?

1 MS. GILLICK: No questions.

2 CO-HEARING OFFICER BAGGETT: Staff?

3 WATER RESOURCE CONTROL ENGINEER MONA: No.

4 CO-HEARING OFFICER BAGGETT: Charlie?

5 MR. O'LAUGHLIN: We would move our exhibits  
6 into evidence.

7 CO-HEARING OFFICER BAGGETT: Any objection? If  
8 not, they're admitted.

9 (Whereupon the above-referenced exhibits  
10 were admitted in evidence.)

11 Any rebuttal?

12 MR. O'LAUGHLIN: Yes. We have rebuttal. I  
13 don't know if you want to ask the prosecution.

14 CO-HEARING OFFICER BAGGETT: Any parties, do  
15 you have rebuttal?

16 MR. O'LAUGHLIN: Yes. Modesto Irrigation  
17 District, State Water Project Contractors, and San Luis  
18 & Delta-Mendota Water Authority have rebuttal.

19 CO-HEARING OFFICER BAGGETT: One party. So  
20 proceed then.

21 MR. O'LAUGHLIN: Okay.

22 CO-HEARING OFFICER BAGGETT: You're the only  
23 one. You're up.

24 ///

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STEPHEN R. WEE

Called on rebuttal by MODESTO IRRIGATION DISTRICT

DIRECT EXAMINATION BY MR. O'LAUGHLIN

--o0o--

MR. O'LAUGHLIN: Tim O'Laughlin again for Modesto Irrigation District.

Mr. Wee, were you present when Mr. Blake testified here this afternoon?

MR. WEE: Yes.

MR. O'LAUGHLIN: Have you reviewed Mr. Blake's testimony?

MR. WEE: Yes.

MR. O'LAUGHLIN: Okay. Can you explain what your understanding is of when the levee along Middle River adjacent to or near the Dunkel property was completed?

MR. WEE: In the summer and fall of 1876.

MR. O'LAUGHLIN: Have you found any document that you can make available to us, whether a newspaper article, historical account, or otherwise, indicating that where Mr. Blake indicated a slough was hydraulically connected to Middle River that a head gate was installed when that levee was constructed in 1875 or 1876?

1 MR. WEE: No.

2 MR. O'LAUGHLIN: Okay. Now, are you confused  
3 as to whether or not the assertion by the Dunkels is  
4 that their parcel is riparian to a slough or is it  
5 adjacent to a main canal?

6 MR. WEE: Yes, it is confusing.

7 MR. O'LAUGHLIN: Okay. What is confusing about  
8 it to you?

9 MR. WEE: Well --

10 MR. O'LAUGHLIN: If you need maps, we can pull  
11 up the maps and you can show.

12 MR. WEE: Well, my historical research  
13 indicates that in 1875, based on Mr. Gibbes's trip to  
14 Roberts Island in order to plan the reclamation of the  
15 middle part of Roberts Island for Whitney, that he  
16 observed that there were two open sloughs on Roberts  
17 Island on Middle River.

18 And one of those is in Section 1, somewhere in  
19 Section 1. There's some indication on later maps that  
20 in the historic period there may have been two sloughs  
21 at some time in that area.

22 But what he says is that there was one slough  
23 in 1875, and that the first order of business in  
24 reclaiming that island was to cut off, to dam that  
25 slough.

1           And I believe that, since he was emphatic about  
2 it, that's what they had to do. The first thing they  
3 had to do was the necessary thing to do, that they did  
4 it.

5           And I think that the fact that they did it is  
6 pretty well confirmed by the subsequent events some --  
7 what is it, 22 years later -- that we have an account of  
8 the Woods brothers for the first time installing  
9 irrigation works, a head gate at the -- in Section 1 on  
10 Middle River, and that they're doing it following the  
11 hiring of somebody to do a survey to try to determine  
12 whether or not they had the potential to reach some of  
13 the lowlands within their area of ownership to deliver  
14 water by gravity to them and that the article that we  
15 have describes this as the first permanent works, the  
16 first irrigation attempts with this gravity-type system  
17 on the Woods property leads me to believe that in fact  
18 for those intervening years, since they didn't know that  
19 they could irrigate, that it became only feasible after  
20 this survey, that's the first indication we have of an  
21 irrigation system, of a head gate that admitted water  
22 for purposes of irrigation on the Woods property from  
23 Middle River.

24           MR. O'LAUGHLIN: Okay. Now, when you -- this  
25 main canal was built pursuant to that newspaper article

1 that you read about, is the main canal located where the  
2 supposed slough is, or is it located in a different  
3 location? If you know.

4 MR. WEE: Well, I'm not positive.

5 MR. O'LAUGHLIN: When the main canal was built  
6 in 1898, Mr. Blake was here earlier and testified that  
7 it ran in a northeasterly direction. Would that be the  
8 main canal that would then not be touching the Dunkel  
9 property?

10 MR. WEE: Yes. The main canal runs pretty much  
11 in a northeasterly direction, and that -- that is what I  
12 understand to have been the original irrigation feature  
13 for the property.

14 MR. O'LAUGHLIN: So as far as we know then, in  
15 1898, a substantial head gate is installed on Middle  
16 River, a canal is installed a half mile long, 25 feet  
17 wide, and runs basically due north, but it is not  
18 abutting the Dunkel property at that time, correct?

19 MR. WEE: That's correct.

20 MR. O'LAUGHLIN: Okay. Now do we have any maps  
21 or any documents that you are aware of to show when the  
22 offshoot from that canal which then runs in a  
23 northeasterly direction is installed or depicted or  
24 whatever?

25 MR. WEE: Well, the first depiction that I have

1 seen of it is what Mr. Blake's calling a 1907-1908 Woods  
2 brothers map.

3 My researchers, who have done quite a bit of  
4 title work, not only on that property but other  
5 properties in that vicinity, they conclude that it's  
6 probably more likely, almost certainly, a 1909 map. But  
7 it could be 1908, but small difference.

8 But that's the first map that I have seen that  
9 shows that secondary canal. And actually it's an -- it  
10 comes off of the main canal. It doesn't actually  
11 connect directly to Middle River. It clearly connects  
12 to the canal that is attached to the head gate.

13 MR. O'LAUGHLIN: That's it for redirect.

14 CO-HEARING OFFICER BAGGETT: Prosecution, any  
15 cross? Mr. Herrick? Mr. Rubin?

16 --o0o--

17 CROSS-EXAMINATION BY MR. HERRICK

18 FOR MARK and VALLA DUNKEL

19 --o0o--

20 MR. HERRICK: John Herrick for the Dunkels.

21 Mr. Wee, you summarized the article just now  
22 regarding the installation of the head gate and the  
23 construction of the canal on Roberts Island. Do you  
24 recall that?

25 MR. WEE: Yes.

1           MR. HERRICK:  And I believe you used the word  
2  "first" in that was the first time some sort of system  
3  had been done; is that correct?

4           MR. WEE:  Well, I think the article makes it  
5  clear that this is the first, you know, permanent  
6  system.  This is the first -- well, yeah.  This is the  
7  first time that they realized, as the article says, that  
8  it was feasible to irrigate land, the low-lying land  
9  within the Woods area of ownership.

10          MR. HERRICK:  You would agree that the article  
11  doesn't say that this is the first system for irrigation  
12  in that area?

13          MR. WEE:  It says that they had a recent survey  
14  done, and they realized on the basis of that survey that  
15  it was feasible to irrigate land in the interior portion  
16  of the low-lying land on their property.  That's what it  
17  says, and that's all I can say.  It certainly suggests  
18  to me that it's the first.

19          MR. HERRICK:  And of course they had more than  
20  just the low-lying land in their large acreage on Middle  
21  Roberts; is that correct?

22          MR. O'LAUGHLIN:  Objection.  Who is "they"?

23          MR. HERRICK:  He was referring to the Woods  
24  brothers land, so I thought he understood that.

25          MR. WEE:  Well, there's land that is lower and

1 higher. It's not all the same elevation.

2 MR. HERRICK: And in fact the immediate  
3 language after the description of that headworks  
4 installation of the canal talks about something about up  
5 until this point siphons are being used for irrigation;  
6 is that correct?

7 MR. WEE: Well, the article is about -- and I  
8 think it's entitled something like Irrigating in the San  
9 Joaquin Lowlands.

10 And the article is about the increase of  
11 irrigation generally in the San Joaquin Delta country  
12 and surrounding country.

13 And they use as an illustration the Woods  
14 brothers system as an illustration of the type of work  
15 that's being done and that this is a permanent  
16 irrigation system they're putting in which apparently  
17 was somewhat novel -- not novel, let's say -- but it was  
18 newsworthy.

19 And then that next comment, if you look in the  
20 context of the article, is that most of the irrigation  
21 that has been -- that is being done in the lowlands, not  
22 necessarily on Woods property but in the lowlands  
23 generally, is done with siphons.

24 MR. HERRICK: And you're making that  
25 distinction that this is another general statement, not

1 one of the Woods land, correct? The article does not  
2 specifically state that.

3 MR. WEE: I think -- in my reading of the  
4 article, I think it's quite clear that it's a statement  
5 about general practices.

6 MR. HERRICK: So in your opinion, the article  
7 goes to the general, then to the specific, and then has  
8 one clause back to the general. Is that your statement?

9 MR. WEE: I think if I could look at it, I  
10 think it refers to -- it uses the plural in terms of the  
11 siphons and systems. I'd to have look at the article,  
12 but it isn't singular. It's a -- the reference is  
13 plural.

14 MR. HERRICK: Mr. Wee, if someone dams a slough  
15 that goes through property that abuts Middle River, does  
16 the damming of the slough affect any riparian right of  
17 that parcel if it still abuts Middle River?

18 MR. WEE: Could you repeat that.

19 MR. HERRICK: If you have a parcel of land that  
20 touches Middle River, abuts it, and that parcel also has  
21 a slough running through it, in your opinion does the  
22 damming of the slough affect the riparian rights or the  
23 riparianness of that larger parcel that still abuts  
24 Middle River?

25 MR. RUBIN: I'm going to object to the question

1 as the question being ambiguous.

2 It's not clear whether Mr. Herrick is referring  
3 to a riparian right the parcel may have to Middle River  
4 or to the slough.

5 MR. HERRICK: Well, I could restate it with  
6 that objection.

7 CO-HEARING OFFICER BAGGETT: Please clarify.

8 MR. HERRICK: Mr. Wee, if you have a piece of  
9 land that abuts Middle River, and it also has a slough  
10 running through it, okay, and then you dam off the  
11 slough: In your opinion, does the parcel remain  
12 riparian to Middle River?

13 MR. WEE: If it's still connected physically to  
14 Middle River, then it still possess that connection; it  
15 is, you know, riparian to the river.

16 MR. HERRICK: Then let's build on that. Let's  
17 call that a hypothetical.

18 So after that, let's propose that through the  
19 hypothetical the parties now dig some sort of canal  
20 trench, some sort of surface feature that transports  
21 water. They dig that through the parcel.

22 And so that digging of that canal or trench,  
23 does that affect whether or not it still has riparian  
24 rights on Middle River?

25 MR. WEE: No.

1           MR. HERRICK:  And now let's connect that  
2 channel or ditch we just constructed, let's connect it  
3 to Middle River.  Does that affect that parcel's  
4 riparian water rights from Middle River?

5           MR. WEE:  We have now an artificial canal that  
6 is running through the middle of a property that fronts  
7 on Middle River.  Is it still riparian to Middle River?

8           MR. HERRICK:  Yes.  That's the question.

9           MR. WEE:  Yes.

10          MR. HERRICK:  Now, let's add to that same  
11 hypothetical.

12           Let's now say that they sell a portion of the  
13 property, and the portion they sell is no longer  
14 touching Middle River but is touching this artificial  
15 channel that is connected to Middle River.

16           Does that indicate any intent to you with  
17 regard to whether or not the parties intended to  
18 preserve a riparian right on the parcel that no longer  
19 abuts Middle River but is bisected by the artificial  
20 channel?

21          MR. WEE:  Okay.  So we have a parcel with a  
22 canal running -- artificial canal running through it  
23 that is riparian to Middle River or some other river,  
24 and a part of that parcel that no longer -- is severed  
25 and no longer touches the river but is adjacent to the

1 artificial waterway or still is connected to --  
2 physically connected to the artificial waterway. Is  
3 that what you're asking me?

4 MR. HERRICK: Yes. And again, the artificial  
5 waterway was connected to Middle River under that hypo.

6 MR. WEE: I would -- if they're splitting that  
7 parcel, and it was no longer connected to the river,  
8 they would need to make some provision for maintaining a  
9 riparian connection if their water right is based upon a  
10 riparian right.

11 MR. HERRICK: And that wasn't the question I  
12 asked you.

13 I asked you whether or not that was an  
14 indication of intent or could be used as an indication  
15 of intent to preserve a riparian water right.

16 MR. WEE: I would think that if you're going to  
17 preserve the riparian right you would have to make some  
18 provision in the conveyance to say so.

19 MR. HERRICK: I'll ask it again.

20 Would you say that that situation could be used  
21 as an intent to preserve a riparian water right?

22 I understand the other ways to preserve a  
23 riparian water right. I'm asking if that could be used  
24 as intent.

25 MR. O'LAUGHLIN: I know you didn't get the

1 answer -- I object. You didn't get the answer you were  
2 looking for, but he's answered it. And he basically  
3 said it has to be in a conveyance document, and so the  
4 answer is no.

5 MR. HERRICK: That's not what he said. That's  
6 not what he said. He --

7 CO-HEARING OFFICER BAGGETT: Re-ask the  
8 question.

9 Overruled, Mr. O'Laughlin.

10 Ask the question one more time to get it clear  
11 on the record what the answer was.

12 MR. HERRICK: Mr. Wee, given the hypothetical  
13 of the parcel of land with an artificial channel going  
14 through the land, and that artificial channel connects  
15 to I said Middle River, but a river, and the subsequent  
16 transfer of a portion of that larger parcel that does  
17 not surface-touch the river, doesn't touch the river at  
18 the surface, but straddles or is bisected by that  
19 artificial channel: I'm asking you whether or not that  
20 set of facts can be used to indicate the intent to  
21 preserve a riparian water right?

22 MR. WEE: I don't think that I have enough  
23 information to conclude that.

24 I would say, as I said before, that I would --  
25 if they clearly expressed it in a deed that they're

1 preserving it, that's fine.

2           Otherwise, I'd have to know more about the  
3 history, the conditions, the relationship between the  
4 parties, other outside evidence other than what you've  
5 presented.

6           MR. HERRICK: Mr. Wee, I understand that  
7 parties can and perhaps should include preservation of  
8 water rights in deeds.

9           In your experience, do you run across questions  
10 of water rights that involve the existence of riparian  
11 rights notwithstanding the fact that someone did not put  
12 a statement in a deed preserving it?

13           MR. WEE: I would say that I have when there's  
14 other -- I mean, there would be other indications that  
15 are clear that you'd have to weigh against what is said  
16 in the deed.

17           I mean you're asking me a hypothetical on an  
18 abstract issue, and I'm trying to say to you that I  
19 would need to know more evidence in order to try to  
20 arrive at an opinion or conclusion, and I don't have  
21 that.

22           MR. HERRICK: I appreciate that except I didn't  
23 ask for your opinion --

24           MR. WEE: Oh.

25           MR. HERRICK: -- on the status of the water

1 right.

2 I asked you whether or not this sort of  
3 information is used to determine intent in the instance  
4 when somebody didn't put a provision in a deed.

5 And I think you're saying you don't want to  
6 answer that.

7 MR. WEE: No, I -- what I'm saying is that if  
8 there is a clear expression in the deed, I think that  
9 there is a preservation.

10 If there isn't a clear intention in the deed,  
11 then I think you have to rely upon a whole array of  
12 other evidence.

13 MR. HERRICK: But you don't want say that the  
14 factual situation I just presented can be used to make a  
15 conclusion about intent. You don't want to say that?

16 MR. WEE: No, I think that it's one factor  
17 that --

18 MR. HERRICK: Thank you.

19 MR. WEE: -- may lead somebody to make that  
20 conclusion, but I wouldn't conclude that based on the  
21 hypothetical you've given me.

22 MR. HERRICK: Again, I didn't ask you to make a  
23 conclusion with regard to the water right.

24 Now isn't that the exact situation that you  
25 allege existed in 1909 or 1908 in that you have a piece

1 of property that you say is a long and artificial  
2 channel connected to Middle River prior to that property  
3 being severed? Isn't that the same situation as the  
4 hypothetical we just went through?

5 MR. WEE: And I would say that I would probably  
6 again need to know more information, and I would seek  
7 information, about what the person was doing out there  
8 on the property adjacent to this canal before I would  
9 render some kind of, you know -- well, I don't want to  
10 say opinion here, but before I could answer your  
11 question.

12 MR. HERRICK: But again, Mr. Wee, I'm not  
13 asking you for your opinion on the status.

14 I'm asking you isn't this the information  
15 that's used by triers of fact to come up with the intent  
16 of the parties in order to make a conclusion?

17 MR. O'LAUGHLIN: Well, I'm going to object.  
18 That calls for a legal conclusion.

19 I mean whether or not this is a factor or isn't  
20 a factor is a question of law, and the question actually  
21 goes to the ultimate trier of facts.

22 So I'm going to object. If he wants his  
23 opinion, I get it. But he's not asking that.

24 MR. HERRICK: Well, Mr. Wee's resume is -- what  
25 is it? 20 pages of participation or comments and

1 opinions in both legal and agency hearings on these very  
2 same issues.

3           And if he doesn't want to say what is used as  
4 intent when there's not expressed language, then that's  
5 his choice. But I'm trying to make sure that's what  
6 he's trying to say rather than avoiding the question.

7           CO-HEARING OFFICER BAGGETT: I would overrule  
8 the objection.

9           Please answer the question. I thought I just  
10 asked -- rephrase and ask one more time to make your  
11 answer clear on the record.

12           If your answer is clearly that you don't know,  
13 that's fine. But let's make a clear answer on the  
14 record because I agree. It's been -- I'm not sure what  
15 the answer is exactly. Do you need to repeat the  
16 question?

17           MR. WEE: Well, let me say this. I have  
18 participated in, you know, as you say, numerous water  
19 right cases, but I've never been asked to interpret the  
20 law or to come to a -- what I do is I provide the  
21 evidence for other -- for attorneys to make those kinds  
22 of judgments.

23           I understand that factors such as the  
24 availability, the existence of water, the infrastructure  
25 to deliver water are factors.

1           But as I said, I -- they can be a measure of  
2 intent, but I'm hesitant to say that just because an  
3 artificial waterway passes along the boundary of a  
4 property that it indicates an intent to deliver water to  
5 that property.

6           I can't say that without knowing additional  
7 factors, and that's -- I don't know how much clearer I  
8 can say it.

9           MR. HERRICK: That's why, Mr. Wee, I didn't ask  
10 you for your conclusion. I asked you if that was one of  
11 the bits of information.

12           So I believe you are saying that is one of the  
13 bits of information that a trier of fact would consider  
14 in determining whether or not a riparian right was  
15 intended to be preserved? Would you agree with that?

16           MR. WEE: I agree that it very likely could be  
17 a factor, yes.

18           MR. HERRICK: And the hypothetical we used  
19 dealt with an artificial channel, and it would be the  
20 same sort of analysis if it was a natural channel rather  
21 than a constructed channel; would that be correct?

22           MR. WEE: Well, I'm having some trouble with  
23 the way you asked that question.

24           MR. O'LAUGHLIN: Just say you don't understand  
25 it and move on.

1 CO-HEARING OFFICER BAGGETT: Mr. O'Laughlin.  
2 MR. HERRICK: No further questions. Thank you.  
3 CO-HEARING OFFICER BAGGETT: Ms. Gillick?  
4 MS. GILLICK: No questions.  
5 CO-HEARING OFFICER BAGGETT: Any recross?  
6 MR. O'LAUGHLIN: No.  
7 CO-HEARING OFFICER BAGGETT: Okay. Evidence?  
8 MR. O'LAUGHLIN: No.  
9 CO-HEARING OFFICER BAGGETT: You didn't have  
10 anything, I guess. No further exhibits?  
11 MR. O'LAUGHLIN: No.  
12 CO-HEARING OFFICER BAGGETT: Okay. No other  
13 parties. That concludes, I think, the proceeding.  
14 Charlie, do you have a question? Forgot to ask you.  
15 CO-HEARING OFFICER HOPPIN: No. I think  
16 Mr. Herrick asked adequately the question I had.  
17 CO-HEARING OFFICER BAGGETT: Anybody else?  
18 Neglected to ask staff. I apologize.  
19 With that --  
20 MR. HERRICK: Mr. Chairman?  
21 CO-HEARING OFFICER BAGGETT: Yes.  
22 MR. HERRICK: If I may.  
23 I would move that the Board rule from the  
24 bench. There is no issue that the property was  
25 connected to Middle River prior to the time or at the

1 time the 1911 agreement to furnish water was recorded.

2 Subsequent to that, it was the result of a --  
3 not a partition -- a parcelling of the larger parcel.  
4 And those are the exact same facts as in the Term 91  
5 case with regard to Mr. Silva.

6 We just all wasted an entire half a day --  
7 sorry; it wasn't half a day -- trying to pick around the  
8 edges of everything except the issue of the most  
9 clearest retention of a riparian water right.

10 And I don't think we need to brief this.

11 CO-HEARING OFFICER BAGGETT: I was going to  
12 suggest --

13 MR. HERRICK: I think we should move forward  
14 with a ruling.

15 CO-HEARING OFFICER BAGGETT: I was proposing no  
16 briefs. I would propose, in lieu of that, the parties  
17 might want to -- the Prosecution Team might want to have  
18 some discussions.

19 The defendant -- we do have a challenge here, a  
20 challenge I keep pointing out to our friends across the  
21 street. I have no authority -- I and my Co-Hearing  
22 Officer have no authority to rule now that this  
23 proceeding has to go to the full Board.

24 It's one of the challenges with this whole  
25 state -- the way we deal with these kinds of issues.

1 I would love to be able to rule right now. I  
2 legally can't. I think you understand that.

3 Now it's got to -- because it's a proceeding  
4 that takes a majority of the Board to uphold an order  
5 and rule on an order.

6 So that being said, all I can do today -- I  
7 think Charlie and I can do -- is take this under  
8 submission. We'll expeditiously deal with this issue,  
9 Mr. Herrick.

10 That's -- unless you've got -- unless someone  
11 here has a better legal interpretation than I think we  
12 do.

13 MR. HERRICK: I understand that.

14 If this is subject to a later decision, I don't  
15 know about the other parties, but maybe a five-page  
16 brief or something might be appropriate.

17 CO-HEARING OFFICER BAGGETT: I don't think we  
18 need a brief.

19 MR. HERRICK: I would ask whether or not the  
20 Prosecution Team believes that it is still requesting a  
21 cease and desist order be issued.

22 CO-HEARING OFFICER BAGGETT: That's why I  
23 suggested the parties might want to meet as soon as we  
24 conclude this proceeding. We'll take this under  
25 submission. If it's still before us, we'll have to

1 write an order and have the Board vote on it. That's --

2 MR. O'LAUGHLIN: Well -- sorry. I didn't mean  
3 to interrupt.

4 You can do what you're going to do, and I  
5 understand that. But my viewpoint on this is that it  
6 should be briefed, it should go to the Board, the Board  
7 makes the determination, and come back because then the  
8 record's clear.

9 Because while you -- I'm getting the gist of  
10 where you may be going. And I understand that.  
11 Needless to say, we have severe disagreements with where  
12 you may end up.

13 And I think the record should be clear because  
14 all these cases are going to go up on the appeal.

15 So let's get them done, get them done right,  
16 get them fully briefed out the door, and then we'll see  
17 what the superior courts have to say about it.

18 My problem is: If you truncate this matter, a  
19 very important point is going to be missed when we go to  
20 the superior court, and that is what water was being  
21 delivered, if any water, to the Dunkel property.

22 Because while it may be Dunkel has a right to  
23 water, what we still haven't determined is whose water  
24 is it.

25 And the important point is if you count it in

1 Woods' favor, then it goes to the 77.7 pre-1914 right.  
2 And if you count it in Dunkels' favor, it's a riparian  
3 right which doesn't support, then, the Woods right.

4 So I think that it should be briefed. I think  
5 we should get done with it. You can issue whatever  
6 order you want. I understand that. Then we can all go  
7 up.

8 But this has a serious factual and legal  
9 implication for not only this matter but for the other  
10 matters that we will be discussing in our other briefs.

11 MS. GILLICK: But it sounds like the staff has  
12 the authority to withdraw cease and desist orders.

13 MR. O'LAUGHLIN: Yeah. The --

14 MS. GILLICK: And if it's withdrawn, then it's  
15 not on the table to --

16 CO-HEARING OFFICER BAGGETT: But that is not  
17 before us.

18 MS. GILLICK: It's not being proposed. I  
19 just --

20 MR. O'LAUGHLIN: No, it's not --

21 CO-HEARING OFFICER BAGGETT: We'll take it  
22 under submission.

23 If Mr. O'Laughlin wants to brief it, any party  
24 wants to brief it, what's a reasonable time frame.  
25 Thirty days after the transcripts.

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(Discussion off the record)

CO-HEARING OFFICER BAGGETT: Ten pages, the  
13th of September, 5 o'clock, close of business.

Take it under submission.

\* \* \*

(Thereupon the WATER RESOURCES CONTROL  
BOARD hearing adjourned at 2:36 p.m.)

1 CERTIFICATE OF REPORTER

2 I, LINDA KAY RIGEL, a Certified Shorthand  
3 Reporter of the State of California, do hereby certify:

4 That I am a disinterested person herein; that  
5 the foregoing WATER RESOURCES CONTROL BOARD hearing was  
6 reported in shorthand by me, Linda Kay Rigel, a  
7 Certified Shorthand Reporter of the State of California,  
8 and thereafter transcribed into typewriting.

9 I further certify that I am not of counsel or  
10 attorney for any of the parties to said meeting nor in  
11 any way interested in the outcome of said meeting.

12 IN WITNESS WHEREOF, I have hereunto set my hand  
13 this August 9, 2010.

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LINDA KAY RIGEL, CSR  
Certified Shorthand Reporter  
License No. 13196

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